92-135

Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH SAN FILIPPO,

Petitioner,

vs.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court below properly hold, consonant with the "void for vagueness" doctrine and the need for fair warning under the due process clause, that certain dismissal regulations at Rutgers, the State University, dealing with standards of sound scholarship and competent teaching covered activities not connected with teaching and scholarship and therefore permitted dismissal of a tenured professor, despite the fact that he was accused of activities not involving teaching or scholarship in any form?

2. Did the court below properly reverse the decision of the district court which held that the Rutgers regulations at issue, based upon their legislative history, attempts at revision and their application in specific cases were void for vagueness since they did not give fair warning that the particular activities with which petitioner was charged could lead to dismissal?

3. Did the Court below err by upholding the validity and application of the regulations without looking at any interpretive guides or permitting factual development and evidence to determine the common understanding of the University community with respect to the reach of the regulations at issue?

4. Did the Court below commit error by not applying this Court's decision in Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991) which held that general standards which contain classic terms of degree and have no settled usage or tradition of interpretation cannot be applied in situations where they do not give fair warning that they can be applied in a given situation.

LIST OF PARTIES

The parties to this action are listed in the caption of the case. None of the parties has any subsidiary or parent companies.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Joseph San Filippo prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, infra, 1a-34a) is reported at 961 F.2d 1125 (3d Cir. 1992). The opinion of the District Court is reported at 743 F. Supp. 327 (D.N.J. 1990) and is reproduced in Appendix B at 36a-63a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on the date of the opinion, April 22, 1992. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). The jurisdiction of the district court over the underlying cause of action is conferred by 42 U.S.C. 1983 and 28 U.S.C. 1331.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The case was brought under 42 U.S.C. 1983. Also involved is the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This case involves an important application of the vagueness doctrine in the context of public employment, as issue that this Court has not examined since Arnett v. Kennedy, 416 U.S. 134 (1974). As noted below, review is necessary in this Court because the Third Circuit, reversing the District Court's grant of summary

judgment, misapplied the Arnett standard and refused to consider this Court's most recent application of the vagueness doctrine in Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991). Review is also necessary because the challenge arises in the context of university regulations relating to the dismissal of tenured faculty members in state universities, an issue which this Court has never considered. [1]

The Petitioner, Joseph San Filippo, was a prominent Chemistry professor at Rutgers - the State University of New Jersey, with a distinguished teaching and scholarship record. But he was a thorn in the side of the Chemistry Department because of his repeated complaints about the violation of University, state and federal regulations by senior members of his department. In return, these senior members then solicited charges against him, specifically that he had allegedly "exploited" certain visiting co-employees of the University from China by allowing them to work in his

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1. The issue of the standards for dismissing tenured faculty members throughout the nation has received considerable attention recently. See "The Need for Academic Tenure Reform," Los Angeles Times, July 4, 1992, B7 (dealing with standards for dismissing professors); "Court Finds a Violation of a Professor's Rights," The New York Times, June 9, 1992, B3 (dealing with successful lawsuit brought by dismissed tenured professor); "Legal Woes on Campus Increase; Due Process Questions Are Often at the Fore," National Law Journal, June 8, 1992, Business Watch, p. 1 (dealing with law suits brought by professors on due process grounds); "Move to Dismiss a Tenured Professor is First at Kansas," New York Times, October 25, 1989, B7: "The Kansas case and a plan by the University of California system to set public guidelines for the discipline and dismissal of 'grossly incompetent' tenured faculty members have raised concern among some professors that such moves could expose them to personal reprisals unconnected with how well they teach."

garden on spring weekends without pay.[2] These co-employees were not students enrolled at the school but foreign nationals employed as researchers in Dr. San Filippo's laboratory. The charges against him were reviewed by a faculty Senate panel and the University administration, each concluding that he had violated the "basic ethical tenets of the profession, including those standards of professional ethics set forth in University Regulation 3.91" and dismissed him from his tenured position.[3]

The only difficulty with this scenario is that the "ethical" rules which he was alleged to have violated do not provide for dismissal and are not subsumed in the dismissal rules of the University, as both the District Court and the Court of Appeals found (22a, 49a-51a). Nevertheless, the Court of Appeals reversed the District Court and upheld the dismissal by invoking other regulations, permitting dismissal if a professor violates "standards of sound scholarship and competent teaching," although it was a given that his actions did not involve teaching and scholarship as they were defined in other regulations at the school (see pp.27-28 below).[4]

The regulations at issue in this case were drafted after many years of debate and effort at Rutgers University (a state-supported university which is a "state actor" for purposes of the due process clause). In 1967, a joint faculty-administration committee revised certain regulations dealing with the discipline and dismissal of

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2. It is uncontested that the "exploitation" charge was the most serious charge brought against Petitioner. The minor nature of the other charges, which are discussed below at pp. 13-15, cast doubt on the bona fides of the entire campaign.

3. The ethical rules in University Regulation 3.91, are quoted in fn. 11 of the Third Circuit decision, 19a.

4. The regulations relating to dismissal are laid out in fn. 5 of the Third Circuit decision, 8a-10a.

faculty members. Those regulations eliminated an "open-ended" "catch-all" provision governing faculty conduct, which had been in effect for many years. Like similar provisions in force in some universities, which provide for dismissal for "conduct unbecoming a teacher," "good cause," or "adequate cause," the previous Rutgers regulations allowed termination of a teacher "because his conduct has been reprehensible and detrimental to the University." (Third Circuit Appendix, "3dA643"; see also 58a).

In 1967, that standard was replaced at Rutgers by a more specific standard permitting dismissal of a faculty member only if he or she was found guilty of (1) incompetence, (2) incapacity, (3) conviction of a crime involving moral turpitude or (4) failure to maintain "standards of sound scholarship and competent teaching." (See Reg. 3.97, quoted at 9a). The clear purpose of such a revised and specific standard was to eliminate the open-ended provisions of the past, which gave broad discretion to the school administration and which could be applied against politically unpopular teachers. Rather, the new rules required school administrators to focus on acts of misconduct specific to the area of teaching or scholarship, such as clear deficiencies in the classroom, plagiarism, academic fraud and the like.

After Petitioner was dismissed, he brought an action in federal court under 42 U.S.C. 1983. On cross-motions for partial summary judgment, the District Court found that the legislative history of the regulations, later proposed revisions as well as the actual application of the regulations in prior dismissal proceedings made clear that Rutgers' dismissal rules covered only specific conduct defined by the rules and that they could not be interpreted as equivalent to open-ended dismissal provisions such as existed in other schools or in previously eliminated provisions in the earlier Rutgers regulations. (60a-61a; 58a).

The District Court also found that the open-ended "ethical" rules found in Reg. 3.91, were not applicable in a dismissal context since those ethical rules were not embodied in the dismissal regulations. ". . . Rutgers has no 'catch-all' provision in its dismissal regulations, much less one which would permit it to terminate a faculty member because he or she acted unethically." (61a). Applying the actual words of the operative regulations, the District Court found: "The rub is this. Professor San Filippo's 'scholarship' and 'teaching,' as those terms are commonly understood, were never . . . at issue." (51a).

Nevertheless in a bewildering decision that seriously erodes the protections of faculty members at Rutgers and in state universities around the country, the Third Circuit said in effect that "standards of sound scholarship and competent teaching" mean whatever the administration thinks those words mean, even if they do not arise in the context of teaching or scholarship. And despite the fact that Rutgers had eliminated an "catch-all" provision in the regulations over twenty-five years ago, the Court of Appeals treated the new specific regulations as if they were equivalent to the rejected rules of the past. Such analysis violates the "fair warning" requirements of the due process clause and requires review and reversal by this Court.

The verbal shell-game engaged in by the Court of Appeals and the University underscores the core constitutional defect in the proceedings against Petitioner. The University's approach is a variation of the Alice-in-Wonderland trick "of making words mean so many different things," or making them mean "just what I choose [them] to mean." [5] However, the United States Constitution requires that fair notice be given to

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5. See Director, OWCP, U.S. Dept. of Labor v. Mangifest, 826 F.2d 1318, 1334 (3d Cir. 1987)(Weis, J. concurring).

any person that certain conduct will lead to specific sanctions against him or her. As the District Court below found, the dismissal regulations at issue here, based upon their specific legislative history and the manner of their prior application at Rutgers, did not give fair notice that they could be applied against the type of activity with which Petitioner was charged. Thus any effort to apply them in this case is unconstitutional under the vagueness doctrine. The Third Circuit erred in reversing the District Court's careful and correct analysis of the relevant constitutional principles.

Statement of Facts:

Petitioner, Dr. Joseph San Filippo, Jr. was an outstanding scientist and teacher at Rutgers for seventeen years, from 1971 to 1988, when he was dismissed. (37a-38a). The Senate Panel that recommended his dismissal made the following comments about his record:

> Professor San Filippo has an excellent record as evidenced by his long list of publications and promotion to the rank of professor in 1984...He has received over a million dollars in research grants and awards. He has worked with industry to bring together funding for equipment at Rutgers. He is an active research[er] with an international reputation and a senior member of the Chemistry department. His research accomplishments are an asset to the University's quest for excellence and distinction. There is no doubt that Professor San Filippo has made positive contributions to the University. (3dA941)

Other scientists in the field testified to his brilliance in his field. Professor F.A. Cotton, one of the foremost inorganic chemists in the world, wrote that San Filippo "was among the most talented young chemists in the country," (3dA432). A Stanford professor

commented on his "large, vigorous and diverse research program," and he was nominated by his own department for the American Chemical Society's Award in Pure Science, as well as for other prestigious awards. (3dA433, 434). His resume shows over 70 published articles and the delivery of over 50 important scientific papers all over the world. (3dA550-55).

His teaching ability was among the highest as well. He received above average teaching evaluations, with students commenting, "very good lecturer," "detailed and clear," "very much in command of the course," "interested and informative professor," and "truly a credit to the Chemistry Department." (3dA439, 440).

Petitioner distinguished himself in yet another way that earned him the enmity of his senior departmental colleagues and the University administration. He repeatedly and publicly objected to what he considered dangerous, improper or even illegal activities at the school. As the District Court below noted,

> Professor San Filippo had to have been a thorn in Rutgers side, continually voicing complaints and filing grievances and arbitrations concerning a variety of matters and filing at least three legal actions against the University aside from this action, conduct which played no explicit part in Rutgers decision to terminate him (38a)(emphasis added).

In 1977 and again in 1979, he made numerous complaints about the dangerous conditions in the chemistry laboratories and was quoted in the school newspaper as calling them "a health hazard and an absolute danger." (3dA443). His comments about health conditions in the laboratories led directly to the creation of a AAUP-University safety committee (3dA446). Petitioner also testified before a state grand jury about

an adjunct faculty member using a chemistry department laboratory to manufacture illegal drugs. For these actions, he was attacked by his department chairman for "washing the department's dirty linen in public" and for his "disloyalty." (3dA458).

Petitioner became embroiled in another dispute in the Chemistry Department in 1983-84, when the department sought to obtain major federal funding for a second mass spectrometer.(3dA459). He cautioned his colleagues that if they persisted in their stated attempt to factually misrepresent the department's needs in this regard, he would report their conduct to the relevant federal agency. The department chairperson and some senior colleagues took this as a threat and placed a letter of reprimand in Petitioner's personnel file. He contacted the U.S. Attorney's office regarding the department's action against him, which the Assistant U.S. Attorney characterized as an effort to obstruct justice. Informed by Petitioner of this, the department withdrew the letter. (3dA460).

Petitioner also complained about various financial irregularities in the Chemistry Department. Thus, when the Department made inappropriate disbursements from his federal research grants, he cited the requirements of federal law prohibiting the leveling of such charges. (3dA446). He objected, for example, to the legality of a "shop user's fee" to Chemistry Department members on the grounds that it constituted double billing (since the shop services being billed were covered by University overhead, provided by his federally funded grants and other charges) and was an inappropriate charge to his federal grant a second time. He called it "illegal." (3dA451).

Dr. San Filippo also had numerous disputes with senior members of his department over promotion and salary increases, which ultimately led to his filing of several grievances against the University. His claims of administrative misconduct in his failed promotion were sustained after a two year proceeding in which the

University's position was presented and defended by the same dean who, approximately a year later, initiated dismissal charges against Petitioner. (3dA454). Rutgers refused to comply with the contractually-mandated remedy and as a result, the Rutgers AAUP Chapter filed suit in state court to secure that remedy for Petitioner. (3dA455, 461-462).

In 1984, Petitioner grieved the fact that he had never obtained a supplemental salary adjustment or merit increase, although he met all the criteria. The first hearings in the arbitration occurred in October, 1985, just about the time the dismissal charges were being prepared. The impartial arbitrator eventually found in Petitioner's favor, holding that he had not been fairly considered for a merit increase. In his final decision, he made independent determinations about the hostility of the department to Dr. San Filippo, finding that part of the antagonism related to Dr. San Filippo's exercise of First Amendment rights. (3dA465).

In addition to the grievances, arbitrations and the AAUP law suit on the promotion, Dr. San Filippo brought other legal actions against the University. One was filed in November, 1985 (just before the dismissal charges were actually served on him). This was a libel action brought in state court against three administrators who had accused plaintiff of "deliberately falsifying" certain time reports concerning one of his technical assistants. Another law suit was brought by Dr. San Filippo against the University was filed in March, 1986, after formal charges had been recommended by the University. That law suit complained, inter alia, of the University's withdrawal of graduate student assistance without a hearing of any kind, based merely on the accusations against him.

The Charges against Dr. San Filippo

The principal charges brought by the University against Dr. San Filippo relate to his alleged mistreatment of certain visiting foreign nationals (not

graduate students, but co-employees at the University). In 1984, while he was on a lecture tour in China, Petitioner was asked by certain Chinese he met to consider accepting several Chinese nationals then employed in chemical research in China as candidates for temporary employment in his laboratory at Rutgers. Petitioner agreed to this proposal despite his written reservations detailing his concern about the professional qualifications of the individuals who had been nominated. Petitioner then made arrangements with the University to sponsor as temporary employees two 29-year old Chinese nationals, Mr. Hetian Gao and Mr. Changhe Xiao, who had been recommended to him.

At the suggestion of the University's International office, Dr. San Filippo assigned these individuals the title "Visiting Scholars," but that title was rejected by the chairman of the chemistry department as inappropriate. He designated them with the employment title of "Visiting Investigators." Because of that change in title and because of their late arrival in the country, Messrs. Gao and Xiao did not qualify for the University's medical benefits program. (This became the basis for one of the dismissal charges, Charge 1(c)(11a)). Months prior to their arrival in his laboratory, Petitioner had provided both Mr. Xiao and Mr. Gao with materials critical to the work they were to perform in his laboratory. Upon their arrival he ascertained that neither understood the work they were to carry out, and therefore neither was prepared to undertake the work they had contracted to perform. Dr. San Filippo expressed to each individual his considerable displeasure at their having failed to prepare themselves for their work assignment. This reproach of an employee for failed performance was interpreted as an abusive threat to send them back to China and was the basis for one of the dismissal charge against plaintiff. (Charge 1(d))(11a).

Dr. San Filippo is an avid gardener and often had visitors on social occasions who would work with him in the garden. On one occasion in May, 1985, Petitioner

invited to his home a Mr. Peng Zhou, a Chinese national who had house-sat Petitioner's home while he was on his lecture tour in China. (Mr. Zhou, who also figured in other dismissal charges, was also involved in research in Dr. San Filippo's laboratory). Petitioner's invitation to Mr. Zhou included the suggestion that Mr. Zhou could bring any friends he might choose. In turn, but unbeknownst to Petitioner, Mr. Zhou invited Mr. Gao to accompany him. Mr. Gao accepted Mr. Zhou's invitation, apparently believing that it afforded him the opportunity to return to the good graces of Petitioner following the displeasure Dr. San Filippo initially expressed when he revealed his lack of preparation for his employment (3dA486). On the same day and again on a later occasion in May, 1985, Mr. Wen-min Shi, the President of the University Chinese Club, himself an avid gardener and a social acquaintance of Petitioner, asked Dr. San Filippo if he could also join him in his garden. Mr. Shi also brought a friend and Mr. Zhou also joined Mr. Shi on this later date and again invited -- unbeknownst to Petitioner -- Mr. Gao to accompany him. (3dA486). Mr. Gao accepted on both occasions, and all participated in normal social intercourse, some garden work on a pleasant spring day, and Dr. San Filippo took them all to a restaurant. (3dA486) [6]

While Mr. Xiao was at the house, he fell and injured his back. Several days later, he asked Dr. San

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6. It must be noted that the invitation by a senior professional to his coworkers to assist in gardening is not an unusual occurrence. Newsweek Magazine reports that Chief Justice Warren Earl Burger "occasionally offered his law clerks the opportunity to plant trees and shrubs at his suburban home on weekends. Few turned him down." Newsweek, June 30, 1986, p. 21. Presumably, on the same theory as that advanced by Rutgers, the Chief Justice could have been impeached for his "ethical" violations on the ground that they violated the "good behavior" standard for federal judges under Article III of the Constitution.

Filippo to drive him to the hospital. (3dA487). Petitioner then learned that Mr. Xiao had no health insurance. On his own initiative, Mr. Zhou, who accompanied Mr. Xiao as an interpreter, offered to present his own medical insurance card in order to insure that Mr. Xiao would be treated. Dr. San Filippo reluctantly agreed, only on the condition that he would pay the full medical expenses when they came. He did in fact make such payment. (3dA487).

Months later, the Chairman of the Chemistry Department, Robert Boikess, [7] learned of these events at Petitioner's house. A series of meetings were held with Messrs. Gao and Xiao and other administrators, from which emerged the following charges (10a-14a):

> a. The charge that Petitioner allegedly exploited Mr. Gao and Mr. Xiao by "leading them to believe that they had no choice but to perform domestic work for [him]" (Charge 1(a))
>
> b. The charge that Petitioner exploited Mr. Xiao by representing that he would be provided health benefits when he came to the United States, but that Petitioner then did not provide such benefits. (Charge 1(c)).
>
> c. The charge that Petitioner threatened and harassed these individuals

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7 Sometime thereafter, Chairman Boikess was called as a witness at a grievance hearing brought by Petitioner. The arbitrator noted with respect to Chairman Boikess' testimony: "One would have to be a piece of wood to fail to notice Dr. Boikess' complete distaste for San Filippo." (3dA598) He also stated that his testimony as well as that of another senior member of the department was "not credible with respect to critical aspects of their testimony." (3dA580).

by stating that he would send them back to China and by directing abusive language against them. (Petitioner was also charged with using abusive language against a Teaching Assistant, Ms. Zong Ping Chen in an episode that occurred in March, 1986). (Charges 1(d) and (e)).

d. The charge that Petitioner directed Mr. Xiao to identify himself as Mr. Peng Zhou in Middlesex Hospital in order to have Mr. Xiao covered by the latter's medical insurance. (Charge 2).

e. The charge that Petitioner encouraged Ms. Marilyn Brownawell to submit a false time report for the week of August 17, 1984. (Charge 3(b)). [8]

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8. Marilyn Brownawell, had been a consultant who operated and maintained Petitioner's mass spectrometer. As a consultant, she had accumulated over 700 hours of uncompensated overtime. Dr. San Filippo had allowed her to take paid vacation time to make up for such hours. In the summer of 1984, her status was changed from consultant to hourly employee. Dr. San Filippo was unclear how that would affect her status; he asked various administrators about what to do and was told to maintain "the status quo" until the situation was clarified. (3dA492). He took that to mean that he could continue to give her paid vacation time to make up for her uncompensated overtime and so informed both Ms. Brownawell and his secretary who prepared time reports for Ms. Brownawell. The latter then took off one week in August 1984, but put in a time report for that week, charging 40 out of 700 hours of her uncompensated overtime as paid vacation. Dr. San Filippo had left for China and the time report was signed by both Ms. Brownawell and his secretary, but not by Dr. San Filippo. Seventeen months later this episode became one of the bases for dismissing him as a tenured professor. (3dA496).

f. The charge that Petitioner violated professional and academic standards by bringing to the University certain foreign visitors as post-doctoral fellows who did not have the appropriate credentials. (Charge 4).

g. The charge that Petitioner submitted a letter of recommendation allegedly signed by a Chinese scholar whom he knew did not actually sign that letter. (Charge 5).

h. The charge that Petitioner was guilty of insubordination in refusing to obey a direct order of the Chairman of his department, Dr. Robert Boikess, that certain foreign nationals not work in his laboratory. (Charge 6).

The last three charges related to the following incidents:

Charge 4: Petitioner sponsored Mr. Peng Zhou as a visitor to the University in January, 1984. Since each such visitor must have an appropriate job title, Petitioner recommended "Visiting Scholar." This title was rejected by the department administrator (a Mrs. Shirley Maimone) who reviewed payroll appointments. Aware that in an earlier equivalent situation Mrs. Maimone had titled another visitor as a "postdoctoral fellow"). Petitioner suggested that Mrs. Maimone consider a similar course of action with regard to Mr. Zhou. Mrs. Maimone checked with the dean's office about using the title "postdoctoral fellow" and she received authorization to use that title. (3dA499). Nevertheless Petitioner was later found guilty of committing a dismissible offense and sacked as a tenured professor in part for suggesting the title.

Charge 5. While in China in 1984, Petitioner received a letter of recommendation handwritten in Chinese by a Professor Liu and submitted on behalf of Mr. Peng Zhou. On his return to the United States, Petitioner had this letter translated by Mr. Zhou, had the translation typed up and had Mr. Zhou transcribe Professor Liu's name to it in Chinese characters as it had been in the original. The letter was forwarded as part of Mr. Zhou's application for graduate school. There was never any question but that the translation was accurate, and that Professor Liu had authored the recommendation. But Petitioner was found guilty of committing a dismissible offense because he did not disclose that the Chinese character which corresponded to Professor Liu's signature on the translated letter was in fact a simulacrum. (3dA501-02).

Charge 6: Even before any formal charges were presented against Petitioner, and before he had any chance to respond to them and before any hearing of any kind was held, the chairman of the Chemistry Department ordered that no more Chinese nationals would be permitted to carry out research with Petitioner. Several such individuals who had worked with Petitioner for years and wanted to continue were forced to stop their work. (3dA503-04). The department later retracted the order, but before that occurred, some of these individuals continued to work in the laboratory. The Senate Panel later concluded that its recommendation would have been the same even in the absence of Charge 6 (3dA939).

Formal hearings to consider the charges were initiated before a Senate Panel of five faculty members chosen by lot, none of whom had any legal training. The hearings began in March, 1987 and continued intermittently through September, 1987. (3dA507) As a result of the unexpected length of the proceedings and the heavy demand on their time, the members of the Panel sought additional compensation from the Rutgers Administration, represented by the Vice President for

Personnel, Susan A. Cole, the chief "prosecutor" of the charges against plaintiff. To this end, the chairman of the panel, Professor Ted Szatrowski, met secretly and continuously with Vice President Cole to discuss additional compensation for the panel members. In fact, after the hearings were completed and the Panel issued its decision in favor of the administration finding Petitioner guilty of dismissible offenses, its members received extremely generous salary increases. (3dA600, 870). Except for a brief exchange about the possibility of summer salary payments, all of these discussions about additional salary occurred off the record without any notification to Petitioner or his representatives. (3dA953-55)

On May 13, 1988, the Board of Governors upheld the findings of the Senate Panel and ordered Petitioner dismissed. (3dA979 et seq.) The Board made an additional finding, not reached by the Senate Panel, that Petitioner was guilty of violating Reg. 3.94 in that his actions showed a failure to maintain standards of sound scholarship and competent teaching. (19a).

There was one dissent, by member Walter Wechsler, who stated that "the punishment is clearly out of proportion to his alleged wrongdoing, and quite possibly tainted by a long history of animus." (3dA1042) He noted the lack of precedent for the punishment: "It is difficult to imagine that, among the thousands employed by the University, only Professor San Filippo had committed offenses of this nature." (3dA1045). He concluded:

> The sanction imposed on Professor San Filippo could be the death knell of his career in higher education. Before sustaining that sanction, we must insure that it was chosen as the result of objective and careful deliberations and is proportionate to the offense. (3dA1047)

The District Court Decision:

After his dismissal, Petitioner brought an action under 42 U.S.C. 1983 against the members of the Board of Governors of Rutgers University, alleging that his constitutional rights were violated in three respects: (1) the Rutgers regulations were void for vagueness; (2) his dismissal was the result of retaliation against his exercise of First Amendment rights; (3) he was denied procedural due process in the conduct of the hearing, in particular because of the financial interest of the members of the Senate Panel in making a finding in favor of the University. The complaint also contained a a number of pending state claims (4a; 49a).

Before discovery was completed, the defendants moved for summary judgment on all claims. Petitioner then cross-moved for summary judgment on the vagueness and procedural due process claims. The District Court granted summary judgment in favor of Petitioner on the vagueness issue.

The District Court found that the words of the regulations do not support any claim that they cover ethical violations. The Court noted that the word "ethics" is not referred to in the dismissal regulations and the word "dismiss" or "dismissal" does not appear in the ethics regulations.(49a).

The Court pointed out that, since ethical considerations were at the heart of the entire effort to dismiss plaintiff, the University had some responsibility to show that such violations could lead to dismissal. But the history of the development of the regulations and proposals to amend them showed that the University community did not believe that ethical violations could be the basis for dismissal. Originally, the regulations provided for dismissal for "conduct ... reprehensible and detrimental to the University." This was changed in 1967 to provide for dismissal only after conviction of a crime involving moral turpitude. Such an amendment made it impossible to conclude that the dismissal regulations

covered any ethical violation, whether or not a moral turpitude crime was involved (58a).

In addition, the Court pointed out, efforts were made to amend the regulations in 1981 to explicitly make ethical violations a basis for dismissal. If the regulations already incorporated ethical dictates, that effort would not have been necessary (54a).

The District Court also found that in two earlier proceedings against faculty members, the Villiers and Leaf cases, the Board of Governors had explicitly held that the ethical regulations were not encompassed within the dismissal rules, that is, a violation of those ethical rules could not lead to dismissal. (50a; n. 23).

If the dismissal regulations do not cover ethical violations, the District Court found that they could not cover the conduct with which Petitioner was charged, since none of that conduct could be considered encompassed by the standard of "sound scholarship" or "competent teaching."

> "Standards of sound scholarship and competent teaching" cannot include ethical violations committed by a scholar and teacher even in the academic setting absent embodying the ethical requirements of 3.91 in those standards, as the common sense definitions of those standards in Appendix D of the University's Academic Reappointment and Promotion Policy [3dA405-410] indicate ... Rutgers, it appears, is attempting to come in the back door after refusing for years, to come in the front. As applied to the conduct charged in this case, 'failure to maintain standards of sound scholarship and competent teaching,' is void for vagueness. (61a)

The District Court then certified the void for vagueness issue for interlocutory appeal under 28 U.S.C. 1292(b)(67a). The Court of Appeals then granted defendants permission to appeal (68a).

The Third Circuit Opinion

The Third Circuit reversed the District Court decision, and found, without any further remand for fact-finding or any need for reference to the understanding of the University community, that the regulations were not void for vagueness. The Court concluded, as did the District Court and as Petitioner had urged, that the "ethics" regulations were not incorporated into the dismissal regulations at Rutgers. (21a)

The Court concluded, however, that the general language found in Regulation 3.94 prohibiting failure to maintain "standards of sound scholarship and competent teaching" could be applied in this situation, even though no teaching or scholarship was involved. The Court held that the vagueness doctrine is based on the idea of fairness:

> Its purpose is only to give "fair warning" of prohibited conduct. Colten v. Kentucky, 407 U.S. 104, 110 (1972). The relevant inquiry is whether the statute or standard is:
>
> > Sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . consonant alike with ordinary notions of fair play and the settled rules of law. [citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)] (25a)

The Court further noted that:

> In the public employment context, the Supreme Court has reiterated that the vagueness doctrine is based on fair notice that certain conduct puts persons at risk of discharge. Such standards are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk of discharge. Arnett, 419 U.S. at 159. Accordingly, broad public employee dismissal standards have been upheld against void for vagueness attacks. The Arnett Court upheld the general standard "such cause as will promote the efficiency of the service" for dismissal of civil service employees. Id. (26a)

It concluded that Dr. San Filippo did obtain fair warning in this situation:

> Under these decisions, while Rutgers dismissal regulations are broad and general, they are not unconstitutionally vague. Dismissal for failure to maintain "standards of sound scholarship and competent teaching" does not fail to specify any standard for dismissal but rather provides a standard which encompasses a wide range of conduct. We reject the district court's narrow reading of this standard based on the absence of a "catch-all" provision in Rutgers' dismissal regulations, and embrace the "common sense" approach of Arnett and its progeny. . . . A reasonable, ordinary person using his common sense and general knowledge of employer-employee relationships would have fair notice that the conduct the University charged Dr. San Filippo with put him at risk of dismissal under a regulation stating he could be dismissed for "failure to

> maintain standards of sound scholarship and competent teaching." Regulation 3.94. He would know that the standard did not encompass only actual teaching or research skills. (emphasis added)(28a-29a)

The Court therefore reversed the grant of partial summary judgment in favor of Petitioner.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD DECIDE WHETHER THE VAGUENESS DOCTRINE WAS MISAPPLIED IN THIS CASE, IN VIEW OF THE COURT OF APPEALS' CONCLUSION THAT THE RULES REGULATING TEACHING AND SCHOLARSHIP COVER MORE THAN TEACHING AND SCHOLARSHIP

The Third Circuit's decision is nothing more than astonishing. Having concluded that the regulations do not encompass ethical regulations found elsewhere in the Rutgers regulations, the Court nevertheless finds that they require a professor to act "decently" toward coworkers, a requirement found nowhere in the school regulations. Having found that the regulations cover scholarship and teaching, the Court then concludes that a faculty member should realize that "the standard did not encompass only actual teaching or research skills."

This type of analysis goes against every element of the vagueness doctrine established by this Court, whether in the criminal or civil context. This Court has emphasized again and again that the key to determinations of vagueness depend upon fair warning. As this Court noted in Grayned v. City of Rochford, 408 U.S. 104, 108 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'"

The void-for-vagueness doctrine applies when civil penalties are imposed upon an individual, see Boutilier v. INS, 387 U.S. 118, 123 (1967)("the 'void for vagueness' doctrine [is] applicable to civil as well as criminal actions"). It applies when administrative rules are used to sanction a government employee: ". . it is well-settled that the prohibition against vagueness extends to administrative regulations affecting conditions of government employment, as well as to penal statutes . ." Bence v. Breier, 501 F.2d 1185, 1188 (7th Cir. 1974). It certainly applies to university regulations that deprive a university professor of a constitutionally protected property right in his position and his professional license. See e.g., Marin v. University of Puerto Rico, 377 F. Supp. 613, 627 (D.P.R. 1974)("the normal vagueness standards apply to university

regulations;" vagueness standard applied to student discipline rules prohibiting "improper or disrespectful conduct in the classrooms or campus" which were found vague). See generally, Note, "Bringing the Vagueness Doctrine on Campus," 80 Yale L. J. 1261 (1971).

The Third Circuit's attempt to stretch the meaning of "scholarship" and "teaching" into the area of "decent" behavior of faculty members toward co-workers -- not involving "teaching" and "scholarship" -- is reminiscent of Alice in Wonderland:[9]

> "'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean -- neither more nor less.'
>
> 'The question is,' said Alice, 'whether you can make words mean so many different things.'
>
> 'The question is,' said Humpty Dumpty, which is to be master -- that's all.'"

It does not take extended analysis to show that if a government official or body can make "words mean so many things," or make it mean "just what I choose it to mean," then the official or body is "master" of all it surveys. If Rutgers is allowed to define "sound scholarship" as anything that a faculty member does in his interpersonal relationships with co-employees or staff that interferes with scholarly activities -- none of which are defined anywhere-- then the rules mean whatever the administration wants them to mean, and it is "master" over the entire faculty.

To make another literary illusion, the French poet Paul Valery, spoke of the "beautiful chains" of language.[10] We are "chained" by language in the sense

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9. See Director, OWCP, U.S. Dept. of Labor v. Mangifest, 826 F.2d 1318, 1334 (3d Cir. 1987).

that the common meaning accepted by society binds the governmental officials who apply the rules against our citizens. And it is the courts' function through the "vagueness" doctrine to insure that government officials do not invent new meanings for operative rules, definitions that do not give citizens fair warning of what conduct is proscribed by those rules and that gives such officials too much discretion to apply those rules for improper reasons.

The Third Circuit improperly relied upon Arnett v. Kennedy, where this Court upheld a standard permitting dismissal of federal civil service employees for "such cause as will promote the efficiency of the service." It was significant in Arnett that a personnel manual was in existence that helped to interpret and define dismissible offenses under the general standard, which was not "written upon a clean slate," id. at 160. In addition the regulations in Arnett covered the entire federal civil service and Congress intended to "give myriad different federal employees performing widely disparate tasks a common standard of job protection," 416 U.S. at 159. Thus a highly general standard was proper. Other aspects of the Arnett decision were overruled by this Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

Furthermore, the Third Circuit completely overlooked and ignored this Court's recent decision in Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991). In that case, this Court examined a disciplinary rule which stated that a lawyer may not make any statement that has a "substantial likelihood of materially prejudicing an adjudicative proceeding." However, the rule had an exception, a "safe harbor" provision under which a lawyer could "state without elaboration . . . the general nature of the . . . defense."

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10. See "The Pythoness," in 4 Penguin Book of French Verse, (N.Y. 1959) at p. 63: "... sainted language...beautiful chains, put on man by the Gods."

This Court held that the latter "safe harbor" rule was void for vagueness, and the lawyer could therefore not be disciplined for violating it. It stated that the rule "fails to provide 'fair notice to those to whom [it] is directed.' . . . A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the 'general' nature of the defense without 'elaboration' provides insufficient guidance because 'general' and 'elaboration' are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law," 111 S. Ct. at 2731.

The Gentile decision would therefore suggest that none of the conduct with which Dr. San Filippo was charged fall within the definitions of the operative terms of the Rutgers regulations. The activities with which Petitioner was charged do not involve "scholarship" or "teaching" in any sense. The modifying terms -- "sound" and "competent" -- are also "classic terms of degree," as this Court stated, which have "no settled usage or tradition of interpretation" in regulating ethical conduct of faculty members toward non-student, co-employees of faculty members. As in Gentile, and unlike Arnett, there was no "clarifying interpretation" of these terms that forewarned anyone that the rules could be applied with respect to allegedly unethical conduct by faculty against such non-students. Indeed, as explained below, the existing regulations interpreting these terms and the precedents in the Villiers and Leaf cases suggest the opposite.

This case involves, every facet of the vagueness doctrine. Rutgers University attempted to change the meaning of its rules in its effort to dismiss Petitioner for what appeared to be highly questionable reasons. (See discussion above on Petitioner's First Amendment activities).

The interchangeable use of the operative language of the rules attempted by the University in this

case, shows that the Respondents were indeed trying to be "master" of the situation by making these terms mean whatever they wanted. But the fair notice requirements of due process clause of the 14th Amendment, embodying the vagueness doctrine, prohibits any such manipulative and elastic use of language.

II.

THE LEGISLATIVE HISTORY OF THE REGULATIONS, THEIR DEFINITION IN OTHER RULES AND THEIR INTERPRETATION AND APPLICATION IN EARLIER INSTANCES DEFINED THE REGULATIONS IN A MANNER CONTRARY TO THAT GIVEN BY THE COURT OF APPEALS

The Court of Appeals examined the regulations as if they were written on a clean slate, without any prior interpretation or explanation. The record belies that approach. The regulations had an extensive history of development and application that the District Court relied upon but the Third Circuit totally ignored. Other University regulations existed which interpreted the key terms (scholarship and teaching) in the dismissal regulations. In addition, there were prior interpretations and applications of the dismissal provisions found in two earlier cases of attempted dismissal by the Rutgers administration, which the Court ignored. The only way in which the Court below could reach the conclusion that it did was to pay no attention to each and every of these interpretative guides.

As noted above, an earlier version of the Rutgers regulations provided that a faculty member could be dismissed "because his conduct has been reprehensible and detrimental to the University." (58a; 3dA643). The change of the regulations to "failure to maintain standards of sound scholarship and competent teaching" must therefore be interpreted as an effort to restrict the reach of the rules to a narrower compass. That

difference in language is totally ignored by the Third Circuit.

In addition, Rutgers has, in other regulations, defined the key terms in the dismissal regulations, namely "teaching" and "scholarship." The standard stated for judging teaching competency is:

> As teachers, members of the faculty are responsible for effective instruction, whether at the undergraduate, graduate, or continuing education level. They should have both a depth and breadth of knowledge in their chosen field and be able to communicate this knowledge to their students. They should maintain an active interest in the advances and current thinking in their subject and be able to relate such information to their teaching in an organized manner. Effective teachers feel and exhibit enthusiasm for their subject and create an environment that stimulates imaginative thinking. They should have deep interest in their students' progress and welfare. Moreover, they should maintain a critical attitude toward their teaching and strive continuously to improve it. (3dA405-10).

The stated standard by which scholarship is judged is:

> Scholarly or creative activity should characterize academicians. If they function as scholars they are responsible to the University and to society to keep informed about advances in knowledge and to contribute to them. Typically, scholars engage in research work and produce publications. However, important and valuable scholarly activity may be carried on without being directed toward the production of research results.

> Such scholarship may be expressed in a variety of ways including teaching, advising, public lecturing, enriching courses, compiling of information, or participating in organized professional activities. These activities may be more difficult to evaluate than research work and publications, but they are no less important. (3dA405-410)

An examination of the University's own criteria regarding the standards of scholarship and teaching on which faculty are evaluated for appointment and promotion do not incorporate any criteria which could provide guidance to a faculty member apropos the conduct alleged against Dr. San Filippo. It would be impossible to apply the standards noted above to the conduct charged against him, none of which related to his teaching of or interchange with students. There is not a word in any of the charges that impugn his research and teaching performance, which were among the highest in his department.

Furthermore, the Board of Governor's prior interpretation of the regulations in the Villiers and Leaf cases shows that Rutgers did not believe that it covered general standards of "ethics" and "decency" not involving students or scholarship.

In this Court's leading case of Bouie v. City of Columbia, 378 U.S. 347 (1964), the defendants were charged with trespass for "sitting-in" a department store lunch counter and refusing to leave after being told to do so. The state trespass statute prohibited entry upon someone's property after being given notice not to enter. It had never been construed as covering the type of conduct with which defendants were charged, namely staying on the property of another after being asked to leave, even though the initial entry was legal. The highest state court, on appeal in that case, broadened the interpretation of the law to cover a refusal-to-leave situation, and construed the law as penalizing the act of

remaining on the premises of another after receiving notice to leave, even if the entry had been permitted. This Court reversed the conviction. It noted:

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive expansion of narrow and precise statutory language. 378 U.S. at 352.

This Court noted that it is a violation of due process "where the construction expectedly broadens a statute which on its face had been definite and precise." For in that case, "an unforeseeable judicial expansion of a criminal statute applied retroactively, operates precisely like an ex post facto law..." 378 U.S. at 353. [11]

In the situation now before the Court, the University is retroactively urging a more expansive interpretation of the dismissal rules than it had ever taken before, an interpretation that is contrary to its interpretation of the rules in the Villiers and Leaf cases. It cannot be allowed to do so since that would violate the "fair warning" requirements of the vagueness doctrine as embodied in the due process clause. The Bouie case precludes any interpretation of the rules in the expansive manner accepted by the Third Circuit.

It must be noted that Petitioner does not dispute that broad language in a dismissal regulation can cover a wide variety of actions. Thus for example, it would not be disputed that the standards relating to "competent teaching" would presumably cover sex harassment of a

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11. The Bouie case shows that the vagueness doctrine covers not only unclear and uncertain language in operative laws which truly do not give any warning about what conduct they cover, but also very precise laws that are applied in a manner totally foreign to their ordinary meaning or their prior interpretation.

student who came to a teacher for assistance on a paper or encouraging a coworker to falsify experimental data. But it would not cover a teacher shouting at his or her secretary, which has nothing to do with the scholarship or teaching relationship.

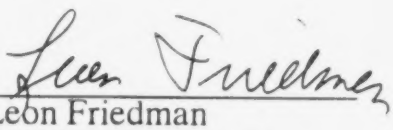
The Third Circuit's refusal to consider any interpretative guides to the regulations and to examine any evidence as to the understanding of the University community as to what they meant goes counter to this Court's decision in Gentile which specifically noted the importance of examining the "settled usage or tradition of interpretation" of the general terms of a disciplinary provision, 111 S. Ct. at 2731. Review by this Court is necessary to correct these errors.

CONCLUSION

This Court should grant the writ to decide whether the vagueness doctrine was properly applied and whether the Third Circuit properly reversed the careful decision of the District Court, which granted summary judgment to Petitioner.

Dated: July 15, 1992

Respectfully submitted,



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APPENDIX

APPENDIX A

Filed April 22, 1992

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 90-6052

JOSEPH SAN FILIPPO, JR.,

Appellee

v.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADREIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, Individually and as members of the Board of Governors of Rutgers University, RUTGERS, THE STATE UNIVERSITY,

Appellants

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Docket No. 88-02575)

Argued: May 14, 1991

PRESENT: HUTCHINSON, COWEN and SEITZ, Circuit Judges

(Opinion Filed April 22, 1992)

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OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

I.

In this certified interlocutory appeal Rutgers, the State University of New Jersey (Rutgers or the University), its Board of Governors (Board) and the Board's individual members appeal an order of the United States District Court for the District of New Jersey. That order granted appellee, Joseph San Filippo, Jr.'s (Dr. San Filippo's) motion for partial summary judgment as to liability on one of several of his claims under 42 U.S.C.A. 1983 (West 1981) that Rutgers violated his constitutional rights when it stripped him of academic tenure and discharged him from his position as a professor at that University. See

San Filippo v. Bongiovanni, 743 F. Supp. 327, 339 (D.N.J. 1990).[1]

The order granting Dr. San Filippo partial summary judgment concerned his claim that the grounds set forth in the University's regulations for dismissing a tenured professor violated his Fourteenth Amendment due process right to fair notice that the acts he was charged with could lead to dismissal because they were void for vagueness. Id.[2]

The sole question before us on this certified appeal is whether the University's regulations were indeed too vague to meet the fair notice requirement

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1. The case remains pending in the district court, but has been stayed pending disposition of this certified interlocutory appeal.

2. Dr. San Filippo's void for vagueness claim is particularly set forth in paragraph twenty-seven of his Third Amended Complaint. It reads:

> 27. The actions of defendants complained of (including the actual dismissal, as described above) violated plaintiff's due process rights under the 5th and 14th Amendments and the comparable provisions of the New Jersey Constitution in that the University regulations under which he was disciplined are vague and uncertain and did not fairly warn him that the acts of which he was accused were violations of University rules. Furthermore, the rules, by specifically mentioning radically different offenses for which dismissal was appropriate, did not give plaintiff fair warning that the type of offenses involved here were so serious that they could serve as the basis for dismissal.

Appendix (App.) at 973.

incorporated in the due process clause of the Fourteenth Amendment to the Constitution. Therefore, we cannot consider or decide Dr. San Filippo's other express or implied claims, or any implied claim that his discharge violated his constitutional right to substantive due process.[3]

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3. San Filippo's other express claims include violation of his rights to procedural due process, equal protection, and free speech under the United States and New Jersey Constitutions, and a New Jersey state law breach of contract claim.

San Filippo's Third Amended Complaint does not include any express claim that the Board's action to revoke his tenure and discharge him for reasons the contract did not permit was a violation of substantive due process. Paragraphs seventeen and eighteen do, however, contain allegations from which it might be possible to infer a substantive due process claim. They state:

> 17. . . . The relevant rule of dismissal is Rule 3.94 which mentions the following offenses: "failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence or incapacitation, or conviction of a crime involving moral turpitude." In such cases, and in only such cases, dismissal is appropriate. But none of the accusations against plaintiff fit within any of the categories mentioned in Rule 3.94 or are remotely covered by, or analogous to, such defined offense. . . .
>
> 18. The conclusion is inescapable that defendants have violated their own standards by invoking as a basis for dismissal conduct which under its own rules do not justify dismissal.

The applicable dismissal regulations state that tenured professors may only be dismissed for adequate cause. Regulation 3.93. Adequate cause is defined as "failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacitation, or conviction of a crime involving moral turpitude . . . ." Regulation 3.94. These regulations are no less definite than provisions permitting discharge for immoral conduct, just cause or conduct unbecoming a teacher. Such provisions have been upheld against void for vagueness attacks in cases involving the discharge of teachers, professors and other public employees. Accordingly, we will vacate the district court's order granting Dr. San Filippo's motion for summary judgment as to liability on his 42 U.S.C.A. 1983 void for vagueness claim and remand the case to the district court for further proceedings.

II.

Dr. San Filippo brought suit against the University in the United States District Court for the District of New Jersey. He based his federal claims on 42 U.S.C.A. 1983. That Statute states:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable

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App. at 966-67.

> exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The University moved for summary judgment on several grounds, including Dr. San Filippo's claim that the University's regulations governing the dismissal of tenured faculty members were so vague that they violated his right to due process. See San Filippo, 743 F. Supp. at 332. Dr. San Filippo filed a cross-motion for partial summary judgment as to liability on this same claim. Id. After oral argument, the district court held that the University's discharge regulations, as applied to Dr. San Filippo, were void for vagueness, as they did not give him fair notice that the charges against him could lead to dismissal. Accordingly, it granted Dr. San Filippo's cross-motion. Id. at 339.

Ancillary to its order granting Dr. San Filippo partial summary judgment on his void for vagueness claim, the district court denied the University's motions for summary judgment on the void for vagueness claim; to strike certain affidavits and exhibits; and to strike Dr. San Filippo's claim for loss of consulting fees. The district court granted the University's motions to strike Dr. San Filippo's claims for punitive damages, front and back pay, and research grants. Id. at 339. It did not decide the remaining motions before it nor did it address the question whether the record before the Board was sufficient for it to find that Dr. San Filippo had committed the particular acts of misconduct which the Board had decided justified his dismissal. Id. at 332-33.

Later, the University moved the district court to certify the void for vagueness question for interlocutory appeal, and to stay the action pending disposition of its petition for permission to appeal and pending appeal if permission is granted. The district court granted the motion and thus amended its order as follows:

> STATED, pursuant to 28 U.S.C. 1292(b) and Rule 23 of the Rules of the United States Court of Appeals for the Third Circuit, that the within Order, in its grant of summary judgment to the plaintiff determining that Rutgers, The State University's dismissal regulations are unconstitutionally vague, involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the litigation . . . .

App. at 1132-33. This Court then granted the University permission to appeal from the certified interlocutory order.

III.

Dr. San Filippo became a tenured professor of chemistry at the University in 1984. Before the University discharged him, he was highly respected by his peers for his professional achievements.

On January 6, 1986, the Dean of the Faculty of Arts and Sciences gave Dr. San Filippo written notice that various complaints had been made against him regarding his conduct towards visiting Chinese scholars brought to the University to work with him on research projects.[4] The allegations included verbal abuse, harassment, exploitation, attempted exploitation,

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4. Dr. San Filippo had previous oral notice of the charges. On November 25, 1985 he met and discussed the charges with the Dean of Arts and Sciences, the assistant to the Dean, an American Association of University Professors (AAUP) advisor, and the Chemistry department Chairman and former Chairman. Dr. San Filippo chose not to respond to the charges at that time.

intimidation, fraud, deceit and misrepresentation. Dr. San Filippo responded with a written denial.

Over the next several months, various administrative actions were taken to investigate and dispose of the charges against Dr. San Filippo. The investigative phase ended on October 1, 1986, when Rutgers' President, Edward J. Bloustein, issue a formal charging document pursuant to University Regulation 3.97. The document stated that Dr. San Filippo "violated the basic ethical tenets of our profession, including those standards of professional ethics set forth in University Regulation 3.91, and that, in doing so, [Dr. San Filippo has] failed in [his] responsibilities to this University." App. at 892. Regulation 3.91 sets forth the Statement on Professional Ethics adopted by the AAUP. The document then stated the charges "meet the standards for dismissal set forth in University Regulations 3.93, 3.94, 3.97, and 3.99 and constitute gross neglect of established university obligations appropriate to your appointment and evidence a failure to maintain standards of sound scholarship and competent teaching." Id. Regulation 3.93 states that a tenured professor may be dismissed for "adequate cause" as defined in section 3.94. Regulation 3.94 defines adequate cause as "failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacitation, or conviction of a crime of moral turpitude . . . ." App. at 977.[5]

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5. Regulations 3.94, 3.97, 3.98, 3.99 and 3.99a set forth the standards and requirements for dismissal of a tenured professor. They state:

> 3.94. Recommendations regarding dismissal of a tenured faculty member or a nontenured faculty member prior to the completion of his or her contract, when the ground is failure to maintain standards of sound scholarship and competent

teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacitation, or conviction of a crime involving moral turpitude, are made to the president through the executive vice president and chief academic officer and the appropriate provost by deans of colleges and schools, with the advice of the tenured faculty, at, or above, the particular rank in the faculty member's department.

3.97. If the President of the University finds reason to believe that a faulty member should be dismissed when the ground is that he has been convicted of a crime involving moral turpitude, or is incompetent, or incapacitated, or has failed to maintain for himself standards of sound scholarship and competent teaching, the President shall send the faculty member a notice stating in detail the charges against him and informing him that he is entitled to a hearing if he shall ask for it within two weeks and that, in the absence of a request for a hearing, he may be dismissed from the faculty.

3.98 If the faculty member requests a hearing, it shall be held by a panel of five, selected by lot from the elected members of the University Senate; but the parties may first exercise a reasonable number of challenges, and a member of the Senate may be excused form service on the panel at his own request, for good cause. The procedure at the hearing shall fully conform to the concept of due process; but the hearing shall not be public unless the respondent so requests. The President of the University shall designate a lawyer or a member of the faculty to present the charges, and the respondent shall be entitled to the aid of counsel. His reasonable expense shall be paid by the University. No administrative

Specifically, the document set forth the following charges:

> 1. Your treatment of scholars visiting from the People's Republic of China and a Chinese Teaching assistant violated the standards of professional ethics required of all faculty members. More specifically, your treatment with respect to these

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> officer of the University shall participate in presenting charges, or as defense counsel, or as member of the panel.
>
> 3.99. The panel shall determine whether the charges, or any part thereof, are true; whether the matters charged and proved constitute ground for dismissal under section 3.93 above; and whether, taking into consideration the respondent's previous records and his value to the University, he should be dismissed or otherwise disciplined.
>
> 3.99a. The report of the panel shall be presented to the Board of Governors and a copy thereof sent to the respondent. Written as well as oral argument may be submitted to the Board on behalf of the President and the respondent. If further evidence is required by the Board, the panel shall be reconvened to receive it and to make any further findings that may be appropriate. The Board shall accord great weight to the findings of the panel, and its final action affirming, revising, or modifying the panel shall be by vote for such action by at least six members of the Board.

App. at 977-78.

individuals, as set forth more fully in the attached documents, is a follows:

a. You took advantage of your professional position and exploited Mr. Hetian Gao and Mr. Changhe Xiao, both visiting scholars from the People's Republic of China, by directing them or by leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985.

b. You attempted to exploit Ms. Yaru Zang, also a visiting scholar form the People's Republic of China, by attempting to make her perform domestic work for you.

c. You exploited Messrs. Gao and Xiao by representing that they would be provided health benefits coverage and that you would deduct $700.00 from the salary to be paid each of them in order to cover the costs of such benefits. Despite deducting such sums, you did not provide coverage for Mr. Gao or Mr. Xiao.

d. During the period of time that the above-named visiting Chinese scholars were at Rutgers, you threatened and harassed those individuals by repeatedly stating that you would send them back to China and by directing abusive language toward them.

e. On or about March 31, 1986, you interrupted without sufficient cause a laboratory class being conducted by Teaching Assistant, Zong Ping Chen. You continued that incident by treating her in an unprofessional, threatening and abusive manner, within the hearing of other individuals, including her students.

2. On or about July 8, 1985, you direct Mr. Changhe Xiao, who had injured himself while doing maintenance work at your house, to identify himself as Mr. Peng Zhou in Middlesex Hospital in order to have Mr. Xiao covered by Mr. Peng Zhou's medical insurance.

3. You encouraged and permitted individuals working under your directions and supervision to submit false time reports and to make inappropriate charges against certain University accounts. Specifically:

a. In or about August 1985, Ms. Abie Lieber, a secretary who works solely under your supervision, submitted a time report form, purportedly to compensate Mr. Hetian Gao and Mr. Changhe Xiao for extra computer (and/or library) work supposedly performed by them, but you told them that the payment was actually to provide them with money to purchase health benefits from the Chinese consulate. Both Messrs. Hetian Gao and Changhe Xiao thereafter

received $100.00 each, charged against your NSF grant, despite the fact that you knew that they had no performed any extra work for the money. (Note the previous promise to provide health benefits recited in item 1.c. above.)

b. Ms. Marilyn Brownawell, who works directly under your supervision, submitted time report forms for the week ending August 17, 1984. She reported and was paid for 40 hours of work for that period, charged against the Chemistry Department's mass spectrometer account, even though you knew that she did not perform any work related to the mass spectrometer or indeed any compensable work for Rutgers of any kind during that period.

4. You violated professional and academic standards and exploited foreign visitors to the University by bringing to the University as post-doctoral fellow Chinese scholars who you knew did not have appropriate credential and by charging the stipends of such individuals, who did not possess doctoral degrees, to your NSF grant as post-doctoral fellows. Subsequently, you supported these individuals for admission to the graduate program in Chemistry, a fact which clearly established that they did not have the credentials to be post-doctoral fellows. Subsequently, you supported these individuals for admission to the graduate program in Chemistry, a fact which clearly

established that they did not have the credentials to be post-doctoral fellows.

5. During Fall 1985, you submitted an application for admission to the graduate program, including letters of reference, on behalf of Mr. Peng Zhou, one of the individuals referred to in #4. above. One of the letters of reference submitted by you purportedly was written and signed by Liu Guozhi. In fact, that letter was not prepared by Liu Guozhi, and you had knowledge of that fact and did not make it known when you submitted the letter.

6. On December 16, 1985, Professor Robert Boikess, Chair of your department, specifically instructed you not to permit Mr. Peng Zhou, Mr. Con-Yuan Guo, or any other graduate student except those already associated with your research group, to work in your laboratory, pending investigation of allegations of exploitation an harassment lodged against you by visiting Chinese scholars. Despite these specific instructions, you subsequently permitted Cong-Yuan Guo, Zhen-Min He, and Peng Zhou to perform work in your laboratory.

App. at 1050-52.

The document concluded that the charges against Dr. San Filippo, if proven, could be a basis for his dismissal, and that if Dr. San Filippo did not exercise his preliminary right to a hearing before a panel of five members of the University Senate (the Panel), President Bloustein would recommend to the Board of Governors (the Board) that Dr. San Filippo be dismissed. Dr. San Filippo requested a hearing before the Senate Panel and his request was granted. The Panel hearing took 250

hours and lasted forty-six days. San Filippo, 743 F. Supp. at 330. Following it, the Panel sustained charges 1a, 1c, 1d, 1e, 2, 3b, 4, 5, and 6 after determining that the facts alleged within those charges were true.[6]

The Panel sustained four of the five subparts of the first charge that Dr. San Filippo had "violated the standards of professional ethics required of all faculty members" through his abuse of visiting Chinese scholars at the University. App. at 892. With respect to charge 1a, the Panel found that Dr. San Filippo's verbal abuse and intimidation of the scholars created a climate in which they felt compelled to perform domestic services for Dr. San Filippo:

> Professor San Filippo took advantage of his professional position and exploited these visiting scholars in a manner that was demeaning and insensitive. Given his abusive and threatening treatment of Messrs. Gao and Xiao, their recent arrival in the United States, and his position as their supervisor, Messrs. Gao and Xiao had little choice in their response.

App. at 906.[7]

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6. Our description of the specifics of the various charges and their disposition is taken primarily from the portions of the record that deal with the Panel proceedings noting, however, where the Panel's report differs materially from the findings and recommendations of the Board.

7. While the Panel found that Dr. San Filippo "did not directly invite Mr. Gao and Mr. Xiao to come over to his house or direct them to do uncompensated work for him," App. at 905, the Board cited evidence that Dr. San Filippo had explicitly assigned chores to the scholars. App. at 998-999.

The Panel did not sustain charge 1b, which asserted that Dr. San Filippo "attempted to exploit" another Chinese visiting scholar by "attempting to make her perform domestic work" for him, App. at 893, because it found the evidence insufficient to support the charge. Charge 1c, which asserted that Dr. San Filippo had deducted money from the salary of two visiting scholars to cover health insurance premiums without obtaining any coverage for them, was sustained as to one visiting scholar, but not as to the other.

Charge 1d concerning Dr. San Filippo's use of threatening and abusive language toward the Chinese scholars was sustained as well. These outbursts concerned the scholars' work performance, a request by one to be taken to the hospital for an injury sustained while performing services for Dr. San Filippo at his home, and the failure of two scholars who had authorized deductions for health insurance premiums from their stipends to otherwise obtain any pay for health insurance from the Chinese consulate.

The Panel also sustained charge 1e concerning Dr. San Filippo's treatment of Zong Ping Chen. It did so after three witnesses testified that Dr. San Filippo had "used a loud, harsh, angry voice and yelled and used obscenities in his discussion with Ms. Chen." App. at 918. On this charge, the Panel found Dr. San Filippo's conduct unacceptable not only because he abused Ms. Chen but also because his interruption of her class "disrupt[ed] . . . the learning environment." App. at 919.[8]

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8. Dr. San Filippo claimed that he was frustrated at the attacks being made on his research program and that Ms. Chen was upset because she had been put on a waitlist for the following semester's teaching assistant roster. He further claimed that he was frustrated with Ms. Chen's handling of the teaching assistant application process. The Panel found these responses did not justify, explain or excuse his actions.

The Panel additionally sustained the second charge. While the Panel found that Dr. San Filippo did not necessarily "direct" Mr. Xiao to use Mr. Zhou's insurance card, it determined that this misrepresentation would not have occurred were it not for Dr. San Filippo's approval of the scheme. Further, while Dr. San Filippo paid Mr. Xiao's hospital bill, the Panel found his payment delinquent in that it only happened after the bill "was in the hands of a collection agency." App. at 921.

The Panel only sustained charge 3b covering Dr. San Filippo's involvement with the submission of false time reports. The Panel sustained this charge because it found Dr. San Filippo had authorized Marilyn Brownawell, an employee working directly under his supervision, to submit time reports that resulted in pay from the chemistry department's mass spectrometer account for times when he knew she was on vacation. The Panel considered Dr. San Filippo's defense that he had an "informal" agreement with Ms. Brownawell regarding her compensation which explained the false time report but found that, even if true, it did not present a mitigating circumstance.[9] It noted that this "informal" agreement resulted in less money bring taken out of Dr. San Filippo's grant funds.

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9. Dr. San Filippo claimed that the time form submitted by Ms. Brownawell was not fraudulent but was authorized by him so that Ms. Brownawell could be compensated for work that she had done for Dr. San Filippo in the past for which she had not yet been compensated. Dr. San Filippo also said that the business manager of the chemistry department led him to believe that he and Ms. Brownawell could continue their informal employment arrangement pursuant to which the time report had been submitted.

The Panel sustained the fourth charge as well. Among the sustained charges, this charge seems most closely related to the requirement stated in Regulations 3.91 and 3.94 that professors "maintain standards of sound scholarship and competent teaching." This charge concerned the appointment of two visiting scholars, Cong-Yuan Guo and Pen Zhou as postdoctoral fellows. The Panel did not sustain it with respect to Mr. Guo but did with respect to Mr. Zhou. Dr. San Filippo had received a memorandum from the University's Vice President for Academic Affairs before he appointed Mr. Zhou stating that only individuals with doctoral degrees could be postdoctoral fellows. Mr. Zhou did not have a doctoral degree. Dr. San Filippo had also been notified by the chair of the chemistry department that Mr. Zhou did not possess the qualifications necessary to hold the position of a postdoctoral fellow. The Panel noted that Mr. Zhou's classification as a postdoctoral fellow gave Dr. San Filippo the advantage of a lower charge against his research grant.

The fifth charge, which asserted that Dr. San Filippo had submitted an individual's application to the University's graduate program knowing that it contained a recommendation letter of questionable integrity was also sustained. The recommendation was presented as an original letter from Liu Guozhi, a professor in China. In fact, it was the applicant's translation of a letter from Professor Guozhi which Dr. San Filippo had edited and on which translation the applicant had signed Professor Guozhi's name in the Chinese characters that represented the professor's signature. In sustaining this charge against Dr. San Filippo, the panel noted there was "insufficient evidence to sustain a charge that there was no original letter of recommendation" from the professor who purportedly wrote the letter that was submitted. App. at 937.

Lastly, the Panel sustained the sixth and final charge which asserted that Dr. San Filippo had allowed three graduate students, Cong-Yuan Guo, Zhen-min

He, and Peng Zhou, to work in his laboratory after being specifically instructed in a memorandum from the chair of the chemistry department that he was not to allow them to work there pending investigation of the complaints lodged against him by visiting Chinese scholars. The Panel noted that the prohibition of Dr. San Filippo's use of graduate students was a "very strong action," but concluded it was not unreasonable given the gravity of the allegations against Dr. San Filippo and therefore should have been obeyed.[10]

Based on its determination that charges 1a, 1c, 1d, 1e, 2, 3b, 4, 5, and 6 were true, the Panel concluded that "the matters charged and proved" met the standard for dismissal of a tenured professor set forth in the University Regulations and, after taking into consideration Dr. San Filippo's "previous record and his value to the University" pursuant to Regulation 3.99, recommended to the Board of Governors that he be stripped of tenure and discharged from his position of professor. App. at 940. The Panel Report stated:

> Professor San Filippo has exploited, threatened and been abusive of individuals who have worked under him in a professional capacity. In addition, we find that Professor San Filippo has demonstrated a serious lack of integrity in his professional dealings. His excellent research record and his contribution to the University are laudatory, and were considered by the Panel in reaching its decision. The Panel unanimously

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10. The Panel reported Dr. San Filippo's response that he did not adhere to his department chair's order not to permit additional graduate students to work in his lab because Dr. San Filippo thought that it would have been "the death of his research program, and that [the] memo was unconstitutional, in violation of the principles of due process and academic freedom, and sections of the AAUP Bargaining Agreement." App. at 938-939.

> recommends, however, that Professor San Filippo be dismissed from the University.

App. at 1031.

After reviewing the evidence and hearing oral argument as to each charge sustained by the Panel, the Board, one member dissenting, affirmed the Panel's conclusions and ordered Dr. San Filippo's immediate dismissal. It concluded that all the sustained charges evidenced "a failure to maintain standards of sound scholarship and competent teaching." App. at 1036. In sustaining ethical charges 1a, 1d, and 1e with respect to Dr. San Filippo's abuse and exploitation of the visiting scholars, the Board relied in part on a portion of the AAUP's Statement on Professional Ethics set forth in University Regulation 3.91 concerning a professor's treatment of students.[11] App. at 1033. The Board,

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11. That portion of the AAUP's Statement in Regulation 3.91 states:

> As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

App. at 976.

however, did not expressly rely on the AAUP Statement in sustaining the other charges against Dr. San Filippo. The Board reasoned that, "although the conduct involved in each of these charges is not specifically enumerated in the national AAUP's Statement on Professional Ethics[,a]ll of these charges flow directly out of Professor San Filippo's activities as a scholar and teacher and constitute serious ethical violations of his responsibilities in these areas." App. at 1036.

IV.

The district court had subject matter jurisdiction over this case under 28 U.S.C.A. 1331 (West Supp. 1991)(federal question) and 28 U.S.C.A. 1343(a)(3)(West Supp. 1991)(civil rights). We have appellate jurisdiction over the University's appeal from the interlocutory order granting Dr. San Filippo partial summary judgment on his void for vagueness claim under 28 U.S.C.A. 1292(b)(West Supp. 1991).

Federal Rule of Civil Procedure 56 states that the moving party is entitled to summary judgment upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Our review of the district court's order granting partial summary judgment is plenary. International Union, UMW v. Racho Trucking Co., 897 F.2d 1248, 1252 (3d Cir. 1990).

In undertaking that review, we look first to the record to determine whether Dr. San Filippo has produced evidence that would sustain his claim that the University's dismissal standards were void for vagueness. The district court's application of the void for vagueness doctrine to the University's dismissal standards is purely an issue of law subject to our plenary review. Id. We

will assess Dr. San Filippo's claim in light of the legal principles set out in the cases involving attacks by discharged public employees upon dismissal standards as unconstitutionally vague to determine if he is entitled to summary judgment as a matter of law.

V.

Rutgers argues that its dismissal regulations incorporate the AAUP Statement on Professional Ethics that is set out in Regulation 3.91 and relied on in part by the Board in its decision to discharge Dr. San Filippo. We reject that argument and instead agree with the district court that the Statement on Professional Ethics that appears in Regulation 3.91 is not incorporated into Regulation 3.93, the regulation setting forth the permissible bases for the dismissal of tenured faculty. We do so essentially for the reasons that the district court set forth in its published opinion. See San Filippo, 743 F. Supp. at 333-37.

That conclusion, however, is not dispositive of Dr. San Filippo's void for vagueness claim. The question remains whether the dismissal standards set forth in Regulations 3.93 and 3.94, typescript supra at 9 n.6, absent incorporation of the ethical standards set forth in Regulations 3.91, were void for vagueness. Our task in deciding this question is complicated by the way the parties have presented their arguments, both here and in the district court. In both fora they devoted most of their attention to the incorporation question. They devoted little attention to the remaining question, i.e., whether the dismissal regulations absent 3.91 are void for vagueness.

The University, in the district court and in its appellate brief, did mention the argument that its general standard of "sound scholarship and competent teaching," absent incorporation of Regulation 3.91, could withstand a void for vagueness attack when considered in the context of the academic community's

shared professional standards. See Brief for Appellant at 23-4. Dr. San Filippo also argued this issue before the district court and devoted a section of his appellate brief to it. See Brief for Appellee at 35-45. Thus, although the parties mainly focused on the incorporation issue, there is no unfairness to Dr. San Filippo in considering whether he has produced evidence that could show the University's dismissal standards, absent Regulation 3.91, are unconstitutionally vague.

Additionally, the district court had an opportunity to consider whether the University's discharge regulations absent Regulation 3.91 are void for vagueness and it did so. After concluding that Regulation 3.91 was not incorporated into the University's dismissal regulations so that purely ethical violations cannot be considered a dismissible offense, the district court also concluded that the dismissal regulations absent Regulation 3.91 were void for vagueness. San Filippo, 743 F. Supp. at 338. This is evidenced by the district court's statement that "[a]s applied to the conduct charged in this case, 'failure to maintain standards of sound scholarship and competent teaching' is void for vagueness." Id.

Under these circumstances, we believe it is both fair and appropriate for us to consider whether the general dismissal standards in Regulations 3.93 and 3.94, absent incorporation of the ethical standards in Regulation 3.91, are unconstitutionally vague.

The due process clause of the Fourteenth Amendment says that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, 1. Due process requirements apply to Dr. San Filippo because his tenured faculty position is a property interest.[12] In

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12. Of course, regardless of the interests involved, no procedural due process is required unless state action is involved in the deprivation of property. It is clear that

Board of Regents v. Roth, 408 U.S. 564, 571 (1972), the Supreme Court of the United States said that in determining whether there is a property interest involved, and thus whether due process requirements apply, courts must look to the nature of the interest involved. "[P]roperty interest protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." Id. at 572. Whenever a "person's good name, reputation, honor, or integrity is a at stake because of what the government is doing to him," id. at 573, a property interest is involved and due process requirements apply. It follows from these principles that a tenured university professor has a property interest in his position, and thus cannot be deprived of that position without due process. See Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956)(summary dismissal of tenured professor violated due process right); Morris v. Clifford, 903 F.2d 574, 576 (8th Cir. 1990)(tenured faculty member has constitutionally protected property right); Yatvin v. Madison Metro. School Dist., 840 F.2d 412, 416 (7th Cir. 1988)("A tenured professor in a public university has a Fourteenth Amendment property right in his job; the right is created by his tenure contract with the university"); Agarwal v. Regents of Univ. of Minn., 788 F.2d 504, 507 n.2 (8th Cir. 1986)(same); Harden v. Adams, 760 F.2d 1158, 1167 (11th Cir.)(same), cert. denied, 474 U.S. 1007 (1985). Cf. Perry v. Sindermann, 408 U.S. 593, 599-601 (1972)(employment contract providing professor could only be terminated for cause constituted property right protected by Fourteenth Amendment).[13]

Rutgers, as a state university, is a state actor. No party has contended otherwise.

13. Strangely, no case in this Circuit specifically states that a tenured university professor has a property interest in his position. Cf. Unger v. National Residents Matching Program, 928 F.2d 1392, 1397-99 (3d Cir. 1991)(citing Yatvin in discussion of property rights

Generally, cases involving dismissals in violation of the principles set out in Roth involve pure procedural due process challenges concerning unfairness in the manner of dismissal. The district court has yet to rule on Dr. San Filippo's pure procedural due process claim and that claim is not before us on this interlocutory appeal. Dr. San Filippo's void for vagueness claim, however, poses a different problem. It asserts violation of procedural due process apart from the manner in which he was dismissed. He claims the standards in the University's dismissal regulations are so broad and general that they did not put him on notice that he could be dismissed for engaging in the conduct with which he was charged.

The void for vagueness doctrine arose as an aspect of Fourteenth Amendment due process in the context of criminal statues because it was thought unfair to punish persons for conduct which they had no notice could subject them to criminal punishment. See Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).[14] The doctrine has been extended to civil cases.

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created by contracts with state entities); Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1076 (3d Cir. 1990)("property interest in employment exists where state law supports a claim of entitlement to continued employment").

14. We note that the void for vagueness doctrine should be distinguished from the related doctrine of overbreadth which is not at issue here but often arises in conjunction with void for vagueness in cases where First Amendment free expression is at issue. The overbreadth doctrine permits a person who is not himself injured to raise the constitutional rights of others. See Kreimer v. Bureau of Police, No. 91-5501, slip. op. at 57 (3d Cir. Mar. 23, 1992). As a practical matter, it is a standing doctrine. The void for vagueness doctrine, on the other hand, requires the person raising it to show that he

See A.B. Small Co. v. American Sugar & Refining Co., 267 U.S. 233 (1925); Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118 (1967). It has further been applied in civil cases involving the discharge of public employees. See Arnett v. Kennedy, 416 U.S. 134 (1974). Lesser degrees of specificity are required to overcome a vagueness challenge in the civil context than in the criminal context, however, because the consequences in the criminal context are more severe. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982).

The doctrine is based on the idea of fairness. Its purpose is only to give "fair warning" of prohibited conduct. Colten v. Kentucky, 407 U.S. 104, 110 (1972). The relevant inquiry is whether the statute or standard is:

> Sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . consonant alike with ordinary notions of fair play and the

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himself has been injured by the overly broad language. See Rode v. Dellarciprete, 845 F.2d 1195, 1200 (3d Cir. 1988)(statute must be vague as applied to person challenging it).

In the university context, First Amendment issues sometimes arise with respect to academic freedom. This, however, does not affect our decision today. Dr. San Filippo does not raise an overbreadth challenge to the University regulations. He was not dismissed, nor does he allege that he was dismissed, for any reason relating to anything that could be considered a free expression issue. We note that he does make a First Amendment retaliation claim unrelated to his void for vagueness claim. That claim has not yet been considered by the district court and is not presently before us.

> settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally, 269 U.S. at 391; see Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1177 (3d Cir. 1990). It is well established the inquiry is undertaken on a case by case basis. The statute or standard is examined as to whether it is vague as applied to the affected party. See United States v. Mazurie, 419 U.S. 544, 550 (1975).

In the criminal context, the Supreme Court has held that since vagueness attacks are based on lack of notice, "they may be overcome in any specific case where reasonable persons would know their conduct puts [them] at risk" of punishment under the statute. Maynard v. Cartwright, 486 U.S. 356 (1988)(definition of mitigating circumstance in Oklahoma death penalty statute that murder was "especially heinous, atrocious, or cruel" held unconstitutionally vague). Thus, to be constitutional, criminal statutes need only give "fair warning" that certain conduct is prohibited. Colten, 407 U.S. at 110. Simply because a criminal statute could have been written more precisely does not mean the statute as written is unconstitutionally vague. United States v. Powell, 423 U.S. 87, 94 (1975). Certainly if such general standards in criminal statutes are sufficiently precise to withstand attack as void for vagueness, analogous standards in the civil context where less specificity is required satisfy due process.

In the public employment context, the Supreme Court has reiterated that the vagueness doctrine is based on fair notice that certain conduct puts persons at risk of discharge. Such standards are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk of discharge. Arnett, 419 U.S. at 159. Accordingly,

broad public employee dismissal standards have been upheld against void for vagueness attacks. The Arnett Court upheld the general standard "such cause as will promote the efficiency of the service" for dismissal of civil service employees. Id. It stated:

> "[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. '[T]he general class of offense to which . . . [the provisions are] directed is plainly within [their] terms . . ., [and they] will not be struck down as vague, even though marginal cases could be put where doubts mights arise.' United States v. Hariss, 347 U.S. 612, 618 (1954)."

Id. (quoting Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973)); see Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)("Condemned to the use of words, we can never expect mathematical certainty from our language."). The Court noted that employees could be guided, in using their common sense, by "longstanding principles of employer-employee relationships, like those developed in the private sector." Id. at 160.[15]

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15. The Arnett court also stated that the employees in that case had the benefit of a personnel manual that added to the general standard. We do not believe the manual's existence was the basis for the court's holding, however. It simply acknowledged the manual in a footnote to demonstrate that it could aid employees in ascertaining the "longstanding principles" of employer-employee relationships to guide them in their behavior. See Arnett, 416 U.S. at 160 n.24. Further, the language

In cases specifically invoiving dismissal of teachers or professors, the courts have upheld general standards against vagueness attacks. In Wishart v. McDonald, a tenured sixth grade public school teacher was discharged when he carried, dressed, undressed and caressed a mannequin in public view on his property located in the town in which he taught. The school's dismissal regulation provided a tenured teacher could be dismissed only for "conduct unbecoming a teacher . . . or other good cause." Id. at 1111. The court, applying Arnett, held the regulation was not void for vagueness as applied to Wishart because his behavior was fairly identifiable by an ordinary person as conduct unbecoming a teacher. Therefore, the regulations gave him notice that his conduct put him at risk of dismissal. Id. at 1116. The court stated: "The choice between specific rules and general standards is a difficult one; each has its unique costs. The real safeguard under a general standard is the common-law adjudicatory process and judicial review." Id. at 1117 (citation omitted).

In Garrett v. Matthews, 474 F. Supp. 594 (N.D. Ala. 1979), aff'd, 625 F.2d 658 (5th Cir. 1980)(per curiam), a tenured university professor found to have been insubordinate in not opening mail from his superior, in failing to comply with his superior's request to supply a list of publications and in failing to keep office hours was dismissed under an "adequate cause" standard. The court upheld the professor's dismissal concluding that the term "adequate cause" was no more vague than the standard approved by the Supreme Court in Arnett. Id. at 599; see Fowler v. Board of Educ., 819 F.2d 657, 664-65 (applying Arnett and

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in the manual shows the breadth of the regulation but does not make it any more specific. See id. The court in Wishart v. McDonald, 500 F.2d 1110, 1116 (1st Cir. 1974) similarly construed the Arnett holding.

Wishart in upholding dismissal standard of "conduct unbecoming a teacher").

Under these decisions, while Rutgers dismissal regulations are broad and general, they are not unconstitutionally vague. Dismissal for failure to maintain "standards of sound scholarship and competent teaching" does not fail to specify any standard for dismissal but rather provides a standard which encompasses a wide range of conduct. We reject the district court's narrow reading of this standard based on the absence of a "catch-all" provision in Rutgers' dismissal regulations, and embrace the "common sense" approach of Arnett and its progeny. Professors at Rutgers can evaluate their behavior's conformity to the dismissal regulations. A reasonable, ordinary person using his common sense and general knowledge of employer-employee relationships would have fair notice that the conduct the University charged Dr. San Filippo with put him at risk of dismissal under a regulation stating he could be dismissed for "failure to maintain standards of sound scholarship and competent teaching." Regulation 3.94. He would know that the standard did not encompass only actual teaching or research skills. Here, all of Dr. San Filippo's charged actions sprang from his role as a faculty member at the University. It is not unfair or unforeseeable for a tenured professor to be expected to behave decently towards students and coworkers, to comply with a superior's directive, and to be truthful and forthcoming in dealing with payroll, federal research funds or applications for academic positions. Such behavior is required for the purpose of maintaining sound scholarship and competent teaching. The academic community can reasonably conclude that otherwise the educational atmosphere is likely to become so tainted and disturbed that it would become impossible to "maintain standards of sound scholarship and competent teaching." Id We find further support of our holding in the following statement by the Panel:

> Through these proceedings, the Panel has felt particular concern for pressures on all of the Chinese scholars that have been involved in the matter before the Panel. Coming to a foreign land to study can be unsettling enough, but to become embroiled in a dismissal proceeding can do nothing to aid their scholarship or personal well-being, or the reputation of the University. We urge the University to avail itself to the fullest to be supportive of foreign scholars and to be sensitive to the pressures that can be placed on them, both willingly and unwittingly, because of their inexperience with our culture and their dependence on their faculty sponsors and the University as a whole.

App. at 942.

Thus, Rutgers' dismissal regulations are not void for vagueness, even thought they do not incorporate the ethical standards set out in Regulation 3.91. The general standards of Regulations 3.93 and 3.94 are sufficient to survive a void for vagueness attack. Were we to accept Dr. San Filippo's argument that 3.93 and 3.94 were void for vagueness absent 3.91, the University could never discharge Dr. San Filippo, or any other tenured professor, for any conduct nor directly involving teaching or research short of committing a crime of moral turpitude. We are unwilling to countenance such a result. Indeed, its starkness may explain the district court's evident dissatisfaction for its own result. See San Filippo, 743 F. Supp. at 338 (stating that Dr. San Filippo's charged conduct is "alien to any concept of how civilized professionals should comport themselves").

We think that unpalatable result arose out of the district court's failure to distinguish the lack of notice inherent in the void for vagueness doctrine from the substantive due process issues presented by a discharge not rationally related to, or covered by, general standards of acceptable conduct. Its confusion of these

principles is traceable to the way Dr. San Filippo presents his void for vagueness claim. As set out in his Third Amended Complaint, Dr. San Filippo's void for vagueness claim confuses two distinct due process themes. See typescript, supra at 3 n.2. The theme that dominates is void for vagueness but, as stated and presented to both the district court and us, it echoes a second theme with overtones of pure substantive due process. The sounds of substantive due process echo back most clearly in Dr. San Filippo's argument that the University's decision to strip him of tenure was based on ethical standards that were not a part of his contract and that his actions towards the visiting Chinese scholars bore no relation to sound scholarship or competent teaching, even if we suppose that those broad, general concepts had been more specifically defined by the ethical standards whose incorporation into Rutgers dismissal standards we have already rejected.[16] This confuses the two doctrines. In a void for vagueness attack, the claim is that the standard is so vague that it is no standard at all and that lack of a standard caused the injury. In a substantive due process attack, the claim is that the standard was not rationally applied to your conduct and thus you were injured.

The Supreme Court's decision in Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) provides guidance. There, in considering whether the University's refusal to allow a student to retake an important examination violated the student's due process rights, the Court stated:

> When judges are asked to review the substance of a genuinely academic decision, such as this one,

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16. Here, we note that although the University's decision was based in part on ethical charges it considered to violate Regulation 3.91, it was as well dependent on charges the University specified violated Regulations 3.93 and 3.94.

> they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. Cf. Youngberg v. Romeo, 457 U.S. 307, 323 (1982).
>
> Considerations of profound importance counsel restrained judicial review of the substance of academic decisions.

Id. at 225 (footnote omitted.) Additionally, several circuits have considered substantive due process claims by dismissed tenured professors or teachers. See Newman v. Burgin, 930 F.2d 955, 962-63 (1st Cir. 1991)(arbitrary decision significantly affecting tenured professor's employment status may violate substantive due process); Morris v. Clifford, 903 F.2d 574, 577 (8th Cir. 1990(recognizing tenured professor's due process right to be free from discharge for "arbitrary and capricious" reasons); Agarwal, 788 F.2d at 507 (same) McEnteggart v. Cataldo, 451 F.2d 1109, 1111 (1st Cir. 1971)(substantive due process challenge to college's failure to renew non-tenured professor's contract required proof that reasons "were unrelated to the educational process or to working relationships within the educational institution"), cert. denied, 408 U.S. 943 (1972). Cf. Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir.)(deliberate and arbitrary abuse of government power violates substantive due process), cert. denied, 488 U.S. 868 (1988).[17]

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17. On the general subject of substantive due process in cases involving dismissals of public employees, see Henry H. Perritt, Jr., Employee Dismissal Law and Practice 6.13 (3d ed. 1992).

The district court and Dr. San Filippo have not fully recognized the distinctions among his constitutional right to fair notice that the charges against him could subject him to dismissal and his substantive due process right to be safe from arbitrary and capricious discharge for conduct that has no rational relation to his duties as a tenured university professor.[18] Dr. San Filippo's arguments on void for vagueness disguise the differences between a state actor's adoption of a statute or a regulation that is so broad it fails to give notice as to what it prohibits with a failure to apply those standards rationally to his conduct. Thus, he fogs the distinctions among federal remedies for violation of substantive and procedural due process and failure to meet the due process standards of fair notice implicit in the void for vagueness doctrine, as that doctrine is applied to discharges from public employment.

Whether Dr. San Filippo has alleged or can establish that the University is liable for wrongfully discharging him on the basis of substantive due process, some other constitutional tort, or breach of state contract law has not yet been decided by the district court. Those alternatives are not before us on this certified interlocutory appeal.

Likewise, none of Dr. San Filippo's other claims are now before us. They are: that his dismissal was in retaliation for activity protected under the First Amendment in violation of the United States and New Jersey constitutions, that his dismissal violated his right

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18. It may also be important to avoid confusing a claim for a deprivation of substantive due process and Dr. San Filippo's express claim under state contract law not to be deprived of tenure unless he acts in a manner that his tenure contract, reasonably read, prohibits and assigns as a ground for discharge. This claim is not presently before us because the district court has not yet ruled on it.

to equal protection of the law under the United States and New Jersey constitutions, that the conduct of the Senate Panel Hearing violated his right to procedural due process under the United States and New Jersey constitutions, and the pendent state claim that his dismissal was a violation of his contract with the University.

On remand, if the district court decides that none of these other federal claims are viable and that Dr. San Filippo has not stated or shown a substantive due process claim by reason of a wholly arbitrary deprivation of his tenure rights or otherwise brought a valid section 1983 claim, it will, of course, be necessary for the district court to exercise its discretion to decide whether to hear Dr. San Filippo's pendent state claim, in accordance with the standards set out in United Mine Workers of America v. Gibbs, 383 U.S. 715, 725-28 (1966).

VI.

We will reverse the district court's grant of partial summary judgment in favor of Dr. San Filippo on his void for vagueness claim and its denial of the University's motion on this same claim and remand this case for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH SAN FILIPPO, JR., :

Plaintiff, :

vs. : Civil Action No. 88-2575

: OPINION

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELIJO, ADRIENNE S.ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY, :

Defendants. :

APPEARANCES: Leon Friedman, Esq.
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By: Linda B. Celauro, Esq.
(Attorneys for Defendants)

BEFORE: BARRY, DISTRICT JUDGE

INTRODUCTION

It is a disgrace that Rutgers, the State University of New Jersey, cannot terminate a faculty member when he or she committed ethical violations of a high order because, for whatever reason, Rutgers has not seen fit to adopt regulations which would permit it to do so. It is similarly a disgrace that 46 days of hearings which culminated in a 44 page report recommending plaintiff's dismissal because he violated the basic ethical tenets of the profession as evidenced by his exploitation of and threatening and abusive behavior towards individuals who worked under him and his lack of integrity in professional dealings, a report sustained by the Board of Governors in a 60 page opinion, must turn out to be a total waste of time and taxpayers' money. Finally, it is a disgrace that, having committed the gross ethical violations seen here, plaintiff will, most likely, return to Rutgers, although that return will hardly be the return of a conquering hero.

FACTS

In 1971, Joseph San Filippo, Jr., plaintiff herein, was employed by Rutgers as an untenured Assistant Professor of Chemistry. In 1977, he earned tenure and became an Associate Professor of Chemistry and in 1984 achieved the rank of full Professor. Rutgers does not take issue with his characterization of himself as not only a respected scientist, an accomplished academic,

and a prolific writer, particularly in his specialty of organometallic chemistry, but also as a researcher who had the ability to obtain substantial monies in research grants and more than one million dollars of scientific equipment for the University (Third Amended Comp. at 12). Certainly, however, aside from any professional prowess, Professor San Filippo had to have been a thorn in Rutgers' side, continually voicing complaints and filing grievances and arbitrations concerning a variety of matters and filing at least three legal actions against the University aside from this action, conduct which played no explicit part in Rutgers' decision to terminate him.[1]

Pursuant to University Regulations 3.94, by letter dated January 6, 1986, Dean Tilden Edelstein, Dean of Rutgers' Faculty of Arts and Sciences, New Brunswick, formally advised Professor San Filippo that various complaints had been made against him concerning his mistreatment of visiting Chinese scholars who were performing research in San Filippo's laboratories. Following Professor San Filippo's response in which, for the most part, he denied the allegations and attempted to justify those he admitted, on February 26, 1986, Dean Edelstein advised Provost Kenneth W. Wheeler of the allegations of "harassment, exploitation and attempted exploitation, and fraud," all allegations "so serious" that, if sustained, warrant dismissal. (Pack Aff., Exh. A). The

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1. Professor San Filippo apparently regarded himself as knight errant amicus at Rutgers. Counsel described some of his activities: he "often expressed himself about what he considered dangerous, improper or even illegal activities at the school"; he "threatened to inform the authorities"; he "constantly reminded [the Chemistry Department] of the requirements of federal law"; and he "had numerous disputes with senior department members ... many of which led to his filing of grievances ..." Plaintiff's Memo. in Opposition to Summary Judgement at 8-10.

tenured faculty of the Department of Chemistry passed a resolution, concurring.

On April 2, 1986 Provost Wheeler wrote to Dr. T. Alexander Pond, Executive Vice President and Chief Academic Officer, stating that the allegations constitute "a gross violation of the 'Statement of Professional Ethics" contained in University Regulation 3.91 and are totally unacceptable in an academic community." (Id., Exh. B). He recommended that Professor San Filippo be formally notified of the allegations which, in his view, warranted dismissal. On August 1, 1986, Dr. Pond advised Professor San Filippo that "the evidence is persuasive that you have violated the basic ethical tenets of our profession and that, in doing so, you have failed in your obligations to this institution." (First Cole Aff., Exh. A). On September 9, 1986, after having given Professor San Filippo yet another opportunity to respond, Dr. Pond recommended to then President Edward J. Bloustein that appropriate action be taken to recommend Professor San Filippo's dismissal to the Board of Governors.

Pursuant to Regulation 3.97, on October 1, 1986 President Bloustein issued the formal charging document advising San Filippo that he has "violated the basic ethical tenets of our profession, including those standards of professional ethics set forth in University Regulation 3.91, and that, in doing so, you have failed in your responsibilities to this University." (Exh. 1 to Defendants' Answer to First Amended Comp.) The charges, President Bloustein continued, "meet the standards for dismissal set forth in University Regulations 3.93, 3.94, 3.97, and 3.99 and constitute gross neglect of established university obligations appropriate to your appointment and evidence a failure to maintain standards of sound scholarship and competent teaching ...." Id.

The charges were detailed by President Bloustein:

"1. Your treatment of scholars visiting from the People's Republic of China and a Chinese Teaching Assistant violated the standards of professional ethics required of all faculty members. More specifically, your treatment with respect to these individuals, as set forth more fully in the attached documents, is as follows:

a. You took advantage of your professorial position and exploited Mr. Hetian Gao and Mr. Changhe Xiao, both visiting scholars from the People's Republic of China, by directing them or by leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985.

b. You attempted to exploit Mr. Yaru Zang, also a visiting scholar from the People's Republic of China, by attempting to make her perform domestic work for you.

c. You exploited Messrs. Gao and Xiao by representing that they would be provided health benefits coverage and that you would deduct $700.00 from the salary to be paid each of them in order to cover the costs of such benefits. Despite deducting such sums, you did not provide coverage to either Mr. Gao or Mr. Xiao.

d. During the period of time that the above-named visiting Chinese scholars were at Rutgers, you threatened and harassed those individuals by repeatedly stating that you would send them back to China and by directing abusive language toward them.

e. On or about March 31, 1986, you interrupted without sufficient cause a laboratory

class being conducted by Teaching Assistant, Zong Ping Chen. You continued that incident by treating her in an unprofessional, threatening and abusive manner, within the hearing of other individuals, including her students.

2. On or about July 8, 1985, you directed Mr. Changhe Xiao, who had injured himself while doing maintenance work at your house, to identify himself as Mr. Peng Zhou in Middlesex Hospital in order to have Mr Xiao covered by Mr. Peng Zhou's medical insurance.

3. You encouraged and permitted individuals working under your direction and supervision to submit false time reports and to take inappropriate charges against certain University accounts. Specifically:

a. In or about August 1985, Ms. Abbie Lieber, a secretary who works solely under your supervision submitted a time report form, purportedly to compensate Mr. Hetian Gao and Mr. Changhe Xiao for extra computer (and/or library) work supposedly performed by them, but you told them that the payment was actually to provide them with money to purchase health benefits from the Chinese consulate. Both Messrs. Hetian Gao and Changhe Xiao thereafter received $100.00 each, charged against your NSF grant, despite the fact that you knew that they had not performed any extra work for the money. (Note the previous promise to provide health benefits recited in item l.c. above.)

b. Ms. Marilyn Brownawell, who works directly under your supervision, submitted time report forms for the week ending August 17, 1984. She reported and was paid for 40 hours of work for that period, charged against the Chemistry Department's mass spectrometer

account, even though you knew that she did not perform any work related to the mass spectrometer or indeed any compensable work for Rutgers of any kind during that period.

4. You violated professional and academic standards and exploited foreign visitors to the University by bringing to the University as post-doctoral fellows Chinese scholars who you knew did not have appropriate credentials and by charging the stipends of such individuals, who did not possess doctoral degrees, to your NSF grant as post-doctoral fellows. Subsequently you supported these individuals for admission to the graduate program in Chemistry, a fact which clearly established that they did not have the credentials to be post-doctoral fellows.

5. During Fall 1985, you submitted an application for admission to the graduate program, including letters of reference, on behalf of Mr Peng Zhou, one of the individuals referred to in #4 above. One of the letters of reference submitted by you purportedly was written and signed by Liu Guozhi In fact, that letter was not prepared by Liu Guozhi, and you had knowledge of that fact and did not make it known when you submitted the letter.

6. On December 16, 1985, Professor Robert Boikess, Chair of your department, specifically instructed you not to permit Mr. Peng Zhou, Mr. Con-Yuan Guo, or any other graduate student except those already associated with your research group, to work in your laboratory, pending investigation of allegations of exploitation and harassment lodged against you by visiting Chinese scholars. Despite these specific instructions, you subsequently permitted Con-Yuan Guo, Zhen-min He, and Peng Zhou to perform work in your laboratory."

President Bloustein advised Professor San Filippo that he was entitled to a hearing and would receive a hearing upon request. If there was no request for a hearing, however, President Bloustein would recommend to the Board of Governors that Professor San Filippo be dismissed from the University. A hearing was requested.

The evidentiary phase of the hearing commenced on March 30, 1987 before a panel of five of Professor San Filippo's academic peers who were members of the Rutgers University Senate - Noel Da Costa, Mary Fetzee, Richard Hixson, David Wilder, and Ted H. Szatrowski, who served as Chair. The evidentiary phase alone consumed 250 hours over 46 days - only 16 of which were used by the University before it rested its case - and generated 5,800 pages of testimony from 33 witnesses and more than 400 exhibits. The Senate Panel, in a 44 page report issued on December 21, 1987, found that all or parts of Charges 1(a), 1(c), 1(d), 1(e), 2, 3(b), 4, 5 and 6, as set forth in President Bloustein's letter of October 1, 1986 were "true". (Exh. 2 to Defendants' Answer to First Amended Comp. at 42). The panel concluded that Professor San Filippo

> violated the basic ethical tenets of our profession, including those standards of professional ethics set forth in University Regulation 3.91 and that, in doing so, Professor San Filippo failed in his responsibilities to the University. The Panel concludes that the 'matters charged and proved' meet the standards for dismissal set forth in University Regulations 3.93, 3.94, 3.97, and 3.99 as evidenced by his exploitation of and threatening and abusive behavior towards individuals who worked under him in a professional capacity and his lack of integrity in professional dealings. Id.

Based on findings of exploitation, threats, abuse, and "serious lack of integrity", the panel, while conceding Professor San Filippo's "excellent record", unanimously recommended dismissal. Id. at 43.

After reviewing the sufficiency of the evidence as to each charge and hearing oral argument, the Board of Governors, in a 60 page opinion issued on May 13, 1988 affirmed - one member dissenting - the recommendation of the Senate Panel and directed Professor San Filippo's immediate dismissal. (Exh. B to First Amended Comp.).[2]

The Board of Governors dismissed Professor San Filippo on the ground that the charges which it sustained evidenced a failure to maintain standards of sound scholarship and competent teaching, a basis for dismissal under Regulations 3.93, 3.94, 3.97, and 3.99. Those classes of behavior which define the standards of "sound scholarship and competent teaching", it believed, are set forth in Regulation 3.91, which adopted the Statement on Professional Ethics itself adopted by the national American Association of University Professors ("AAUP"). The Board set forth those portions of Regulation 3.91 it believed provided the relevant definition:

> 3.91. Since the very nature of a university and its value to society depend upon the free pursuit and dissemination of knowledge and free artistic expression, every member of the faculty of this University is expected, in the classroom and studio, in research and professional publication, freely to discuss subjects with

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2. The dissenting member found "clearly sufficient evidence" to sustain the charges but believed the sanction of dismissal was too severe. Id. at 63.

which he is competent to deal, to pursue inquiry therein, and to present and endeavor to maintain his opinion and conclusions relevant thereto. In expressing those ideas which seem to him justified by the facts, he is expected to maintain standards of sound scholarship and competent teaching. He shall conduct himself in accordance with the standards of professional ethics set forth in paragraph I to V, inclusive, of the Statement on Professional Ethics adopted by the American Association of University Professors at its annual meeting, April 1966.

Statement on Professional Ethics

* * *

II. As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster hones academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

* * *

(Emphasis in Board of Governors' Opinion, at 51-52).

Those charges which, in the Board of Governors' view, were the most serious, i.e. 1(a), 1(d) and 1(e), which concerned Professor San Filippo's order that two Chinese scholars do gardening and cleaning at his home and his threatening and abusive treatment of these two scholars, plus a third, "directly fall under the prohibition of Paragraph II of tho national AAUP's Statement on Professional Ethics", Id. at 52, set forth above. "The behavior stated in these sustained charges demonstrate[s]", the Board concluded, "clear 'exploitation of students for his private advantage' and lack of proper 'respect for the student as an individual' and thereby meet the standards for a dismissible offense under University regulations." Id. The other sustained charges, in the Board's view, also constitute a clear "failure to maintain standards of sound scholarship and competent teaching" and, therefore, also meet the standards for a dismissible offense even though the conduct underlying those charges was "not specifically enumerated" in the Statement on Professional Ethics. Id. at 53. These charges "flow directly out of Professor San Filippo's activities as a scholar and teacher and constitute serious ethical violations of his responsibilities in these areas". Id. at 55.

On June 13, 1988, pursuant to 42 U.S.C. 1983, Professor San Filippo instituted this action against the University and the six members of the Board of Governors who voted in favor of his dismissal alleging various violations of his rights under the United States Constitution, violations of his corresponding rights under the New Jersey State Constitution, and breach of contract.

More specifically, as set forth in what is by now is Third Amended Complaint, Professor San Filippo alleges: (1) violation of his due process rights on the basis of vague and uncertain University dismissal

standards which did not fairly warn him that the acts of which he was accused violated University rules and could serve as the basis for dismissal, 27; (2) violation of his First Amendment rights and comparable provisions of the New Jersey Constitution by virtue of the commencement of dismissal proceedings and his dismissal in retaliation for his filing of lawsuits, grievances and complaints against the University and its employees, 28; (3) violation of his equal protection rights and comparable provisions of the New Jersey Constitution in that he was selectively chosen as a target for disciplinary action, 29; (4) violation of his procedural due process rights resulting from the conduct of the hearing and the negotiation for additional compensation between one or more members of the Senate Panel and the administration while the hearing was ongoing, 30; and (5) breach of the contract established by Rutgers' rules and regulations because his dismissal was predicated upon offenses which could not be the basis of dismissal under that contract, 31.

Defendants now move for summary judgment on a host of grounds, to strike affidavits and certain exhibits relied upon by Professor San Filippo in opposition to that summary judgment motion, and, in the alternative, to strike his claim for damages. Professor San Filippo moves for summary judgment as to his claims that the dismissal standards, as applied to him, were unconstitutionally vague and that his procedural due process rights were violated. Neither side of the case asks me to decide the issue -- if issue it be -- of whether, on the basis of the evidence presented, the charges against Professor San Filippo were proven and whether, based on the evidence as to proven charges, dismissal was warranted.

For the reasons that follow, Professor San Filippo's motion for summary judgment on the vagueness claim will be granted and defendants' motion for summary judgment on that claim will be denied. Defendants' motion to strike affidavits and certain

exhibits will be denied as well[3] and their motion to strike Professor San Filippo's claim for damages will be granted in part and denied in part. Given this disposition, the remaining motions need not and, thus, will not be decided.

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3. Affidavits submitted in conjunction with a motion for summary judgment must contain admissible evidence within the personal knowledge of the affiant to which he or she is competent to testify. Fed.R.Civ.P. 56(e); Fowle v. C&C Cola, 868 F.2d 59, 67 (3d Cir. 1989); Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 282 (3d Cir. 1988). Defendants have ferreted out from the hundreds of paragraphs that comprise the three affidavits in question and the volumes of exhibits attached thereto numerous legal arguments and conclusions and statements not based upon personal knowledge, as well as other instances of purportedly inadmissible evidence. They do not, however, separate out many statements which, while not based on personal knowledge are, nonetheless, helpful statements of opinion or belief that rest upon an adequate factual foundation, see F.R. Evid. 701; and do not distinguish many statements which are not hearsay because they are not offered to show the truth of the matter asserted or are otherwise admissible as exceptions to the hearsay rule. Inadmissible evidence can, in most instances, be excised with surgical precision. See 10A Wright, Miller & Kane, Federal Practice and Procedure, 2738, p.509 ("The court will disregard only the inadmissible portions of a challenged affidavit and consider the rest of it.") Mindful of the admonition that evidence should not be excluded on summary judgment on "hypertechnical grounds," Fowle, supra, 868 F.2d at 67, I will disregard those portions of the affidavits that fail to comport with the standards of Rule 56(e). Accordingly, defendants' motion to strike the affidavits and accompanying exhibits is denied.

DISCUSSION

The Regulations Defining Dismissible Offenses Do Not Cover and Cannot Be Interpreted To Cover the Conduct For Which Professor San Filippo Was Dismissed.

Certainly, the ethical standards set forth in Regulation 3.91 put Professor San Filippo on notice that the conduct in which he engaged was impermissible. Query: was he on notice that his unethical conduct would, under the University's dismissal standards, be cause for dismissal? Stated somewhat differently, are the ethical standards contained in Regulation 3.91, which incorporates the AAUP Statement on Professional Ethics, legally enforceable rules subsumed within and otherwise defining Regulations 3.93-3.99a, the dismissal standards? Defendants say "yes"; Professor San Filippo says "no." The answer is clearly "no."

First, "Regulation 3.91 Concerning Professional Ethics for Faculty Members," as 3.91, in effect since January 1967, is entitled, never defines, nor was it intended to define, what, if any, ethical violations are dismissible offenses; indeed the word "dismiss" is nowhere to be found. It sets forth, in plaintiff's phrase, a "moral imperative" for the faculty, and nothing more.[4] Plaintiff's Memo. in Support of Motion for Summary Judgment at 12. Second, when "University Regulations 3.93-3.99a Concerning Procedures to be Followed in the Dismissal Proceedings of a Tenured Faculty Member," as the dismissal regulations are entitled, were adopted in September 1972, the ethical standards set forth in Reg. 3.91 and, indeed, even the word "ethics," were neither incorporated nor referred to and, thus, violations of

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4. Professor San Filippo concedes that the adoption of 3.91 was not a "meaningless gesture" and assumes that it can be enforced against a faculty member in ways other than dismissal. Plaintiff's Memo. in Opposition to Motion for Summary Judgment at 41, note 3.

those standards cannot be a basis for dismissal. Third, an examination of the proposed, withdrawn, and adopted amendments to the dismissal regulations over a period of more than ten years confirms that violations of ethical standards cannot, of themselves, be the basis of a dismissal decision. None of this is seriously disputed.

Regulation 3.97, as Rutgers' itself conceded in In re: Villiers, outlines the only bases for dismissal and this, too, is not in dispute.5 3.97 states:

> 3.97. If the President of the University finds reason to believe that a faculty member should be dismissed when the ground is that he has been convicted of a crime involving moral turpitude, or is incompetent, or incapacitated, or has failed to maintain for himself standards of sound scholarship and competent teaching, the President shall send the

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5. Professor Villiers was charged with "gross neglect of established University obligations appropriate to the appointment," Reg 3.94. The charges were sustained and he was found to have "repeatedly violated University Regulation 3.91." Friedman Aff. Exh. 20 at 8. Because, however, 3.97, which, Villiers held, defines the dismissible offenses, did not give adequate notice that the transgressions at issue -- violations 3.91 and 3.94 -- could lead to dismissal, the Board found that Villiers could not be dismissed and imposed a lesser sanction. Similarly, dismissal proceedings against Professor Russell C. Leaf were dropped because of Villiers. Three of the seven charges against Leaf charged violations only of 3.91 (Id. Exh. 21,22). Aside from whether Villiers and Leaf are legally binding, they provide an authoritative interpretation of the Regulations which could thereafter be relied upon. In a nutshell, unless one is charged with a violation of 3.97, he or she cannot be dismissed.

> faculty member a notice stating in detail the charges against him and informing him that he is entitled to a hearing if he shall ask for it within two weeks and that, in the absence of a request for a hearing, he may be dismissed from the faculty.

Indeed, Rutgers continues to maintain that 3.97 alone sets forth the bases for dismissal, arguing, however, that Reg. 3.91 "defines" standards of sound scholarship and competent teaching, one of the bases for dismissal set forth in 3.97. (Defendants' Br. in Support of motion for Summary Judgment at 29).

And so while professor San Filippo was advised by President Bloustein in the formal charging document that he had "violated the basic ethical tenets of our profession, including those standards of professional ethics set forth in University Regulation 3.9l," he was also advised that the conduct at issue evidenced "a failure to maintain standards of sound scholarship and competent teaching," an offense set forth in 3.97. (Exh. 1 to Defendants' Answer to First Amended Complaint). Because, Rutgers' argues, the ethical standards of 3.91 "define" standards of sound scholarship and competent teaching, Professor San Filippo's vagueness claim must fail because the dismissal standard invoked here -- "sound scholarship and competent teaching" -- is not vague as applied to the "serious ethical violations" committed by him, conduct which falls within the clear proscription of the Statement on Professional Ethics. (Defendants' Br in Support of Motion for Summary Judgment at 29).

The rub is this. Professor San Filippo's "scholarship" and "teaching," as those terms are commonly understood, were never -- and are not now -- at issue and, were they, the Board would not have had to utilize, as it did, the ethical imperatives of 3.91 to provide "definition" to those terms. Stated somewhat differently, what is clear from the Board's decision is that

Professor San Filippo committed ethical violations which had absolutely nothing to do with "scholarship" and "teaching" but because those violations were committed by a scholar and a teacher, "standards of sound scholarship and competent teaching" were supposedly not maintained.

Parenthetically, what leads Rutgers to conclude that 3.91 "defines" "sound scholarship and competent teaching" and how any language in 3.91 relevant to a definition of those terms possibly assists Rutgers is less than clear. Certainly, the terms "sound scholarship and competent teaching" in one sentence are not given definition by the mere exhortation in another sentence, with no apparent connection between the two, to conduct oneself in accordance with the standards of professional ethics. Certainly, too, there is nothing at any point in 3.91 in connection with anything akin to scholarship and teaching competence language that concerns other than the teacher's obligation to his or her students in the academic setting -- as the very first sentence of 3.91 puts it, "in the classroom and studio" not, I suggest, in the garden or during indoor or outdoor cleaning. Stated somewhat differently, even if 3.91 defined "sound schoalrship and competent teaching" in the academic setting, which it did not, nothing in 3.91 even hinted that it had anything to do with those terms in an extra-curricular setting even assuming that an extra-curricular setting vis-a-vis those terms can be imagined, which it cannot.

Be that as it may, it bears repetition that ethical violations -- wherever they occurred -- were the basis of the dismissal at issue here and ethical violations only, although the Board was careful to invoke the "sound scholarship" "competent teaching" language, albeit without much enthusiasm. Two examples will suffice. "The serious lack of ethics in the employer-employee relationship found [in charges 1(c) and 2] constitutes adequate ground for finding a lack of maintenance of

'standards of sound scholarship and competent teaching,'" id. at 56; charge 4 " concerns the responsibility of a teacher-scholar to act ethically ... and likewise can be considered a failure to maintain 'standards of sound scholarship and competent teaching.'" Id. at 56-57.

With ethical violations playing such an important part in the dismissal decision and with any failure to maintain "standards of sound scholarship and competent teaching" -- as those terms are commonly understood -- seemingly irrelevant, an examination of what, if any, part ethical violations can play in a dismissal decision is important. In early 1980, the Board requested that the administration review the University regulations and statements on the ethical obligations of faculty and, if warranted, make recommendation, and a select committee of faculty and administrators was established (Friedman Aff., Exh. 4). At the same time, the administration was considering a revision of 3.91 "with particular emphasis on ... dismissal processes." Id. A paper entitled "Background notes: Faculty Ethics at Rutgers," apparently prepared by the Office of the Executive Vice President, was distributed on March 14, 1980 to the committee members. Id. at Exh. 5. It described the AAUP Code contained in 3.91 as more comprehensive than other institution - specific codes, yet stating only "broad ethical principles; it does not in the manner of a legislative code, spell out in concrete detail the specific behaviors which are prescribed or proscribed by those principles." Id. at 2,3. The final report of the committee was submitted to President Bloustein on January 20, 1981 and, with reference to ethical concerns, said little beyond what the "Background Notes" had said and suggested little in the way of change although noting, somewhat curiously in my view, that dismissal was then available as a sanction for ethical violations. Id. Exh. 6 at 7.

Meanwhile, an Advisory Committee on Faculty Dismissal Procedures was operating and, on July 15,

1981, its report was forwarded to President Bloustein and the President of the Rutgers Council of the AAUP. Id. Exh. 7. That report recommended, as relevant here, that the sanction of dismissal be available only for academic incompetence or for a serious or persistent breach of professorial standards. In determining whether academic incompetence exists or professorial standards have been breached, evidence of

> (1) serious or persistent failure to maintain standards of sound scholarship, competent teaching and professional conduct, or of
>
> (2) serious or persistent neglect of University obligations which relate directly and substantially to a faculty member's fitness in his professional capacity;
>
> 3) conduct involving moral turpitude which relates directly and substantially to fitness as a faculty member shall be relevant. Id. Exh. 7at 3.

Importantly, in a footnote the committee observed that "standards of sound scholarship, competent teaching and professional conduct" incorporates, but is not limited to, among other things, the AAUP Statement on Professional Ethics. Id.

Thus, for the first time in many years, violations of ethical standards were explicitly proposed as a basis for dismissal. One wonders why this proposal would have been deemed necessary if, as Rutgers argues, those ethical standards were already incorporated within the terms "standards of sound scholarship and competent teaching" which appear in 3.97 and were to be retained. The proposal was never adopted.

Apparently, additional drafts of the report were prepared by the administration, one draft proposing that

a violation of any University regulation would be a basis for dismissal. Friedman Aff. at 15. Apparently, too, the faculty vociferously opposed that draft with Dean Peter Simmons of the Rutgers Law School describing it as "patent foolishness." Id. and Exh. 8 at 2. On March 18, 1982, the draft was withdrawn for revision in light of the comments received. Id. Exh. 9.

Almost another year went by before the Final Report of the President's Select Committee on Faculty Ethics was submitted to a closed session of the Educational Planning and Policy Committee on January 26, 1983. Id. at Exh. 10. This report proposed a much broader range of conduct to be disciplined, including the discipline of dismissal. Once again, a violation of the Statement on Professional Ethics (now contained in proposed Reg. 3.72) was proposed as a basis for dismissal. The report also proposed that the failure to abide by University rules, regulations, policies, and requests and insubordination be made bases for dismissal. Id. at 7,8. Quoted in full, "cause" as defined in III A of the proposal "shall include but not be limited to:

1. Failure to maintain standards of sound scholarship, competent teaching or professional conduct as defined in Regulations 3.71 and 3.72;

2. Failure to abide by University rules, regulations and policies;

3. Neglect of University obligations or responsibilities appropriate to his/her appointment;

4. Failure to comply with administration requests which are appropriate to his/her appointment and which are consistent with

> University rules, regulations, and policies: or insubordination;
>
> 5. Conduct exhibiting gross moral turpitude or depravity and which reflects upon fitness to serve as a faculty member.

Id. at 7.

All hell broke loose. 26 members of the Department of Physics -- a majority -- and 37 members of the Department of Psychology, for starters, submitted resolutions to Provost Wheeler which stated, as pertinent here:

> We strongly oppose the following as being far too broad and vague and, therefore, potentially subject to abuse:
>
> (a) Dismissal for "failure to maintain professional conduct";
>
> (b) Dismissal for "conduct exhibiting neglect of established University obligations or responsibilities";
>
> (c) Dismissal for "conduct exhibiting gross moral turpitude..."
>
> (d) Dismissal for "failure to abide by university rules, regulations and policies or insubordination."

Id. Exh. 11.

Now having struck out twice in terms of obtaining faculty acceptance of its proposed revisions of the dismissal regulations, the administration tried again In

August, 1983, it determined that yet another committee -- comprised of administrators, faculty, and AAUP and Board of Governors representatives -- would be formed to revise Regulations 3.70-3.99 and that committee was established in late 1983. Id. Exh. 12. In April, 1984, a draft of proposed revisions dealing with outside employment was issued and in June, 1986, more than two years later, the Board of Governors approved those revisions. Id. 20, 21; Exh. 13, 14.

On September 16, 1986, the remaining proposed revisions of regulations 3.70-3.99 were submitted to the faculty for comment. Id. Exh. 15. The proposed regulation dealing with dismissal (Reg. 3.74) defined "cause" adequate for dismissal as

> "persistent or recurrent failure to maintain appropriate standards of sound scholarship and competent teaching, or gross neglect of established obligations appropriate to the appointment or gross disregard of Regulations and other written policies of the University, or conviction of a crime that involved moral turpitude and that reflect adversely upon fitness to serve as a faculty member." Id. at 2.

On February 18, 1987, the proposed revisions were submitted to President Bloustein for approval by the Board of Governors. As of this date more than three years later -- the proposed revisions dealing with termination for cause, 3.70-3.74, and the dismissal regulations, 3.90-3.98, have not been approved.

The foregoing exegesis make certain things crystal clear. First, as noted earlier, Regulation 3.91 -- which includes the Statement on Professional Ethics -- does not mention dismissal or anything to do with dismissal and the dismissal regulations do not mention ethics or anything to do with ethics. A violation of 3.91 is simply not a dismissible offense and, were it otherwise,

there would have been no need in 1967 to specifically incorporate as a ground for dismissal under Regulation 3.97 conviction of a crime involving moral turpitude, a ground, I note, which replaced "conduct ... reprehensible and detrimental to the University," (Second McNatt Aff., Exh. B, E), a not insignificant fact. Moreover, it makes utterly no sense that while one must actually be convicted of a crime involving moral turpitude before he or she can be dismissed, all of the generalized ethical imperatives set forth in 3.91 but not even alluded to in 3.97 would, nonetheless, similarly permit dismissal. And, of course, if violations of these ethical imperatives were grounds for dismissal, whether on their own or as "defining" one of the grounds for dismissal set forth in 3.97, why the extraordinary efforts over more than ten years to put in what was already there and why the sturm und drang when those efforts were made?[6]

I return to where I began. Professor San Filippo argues that if the dismissal regulations and, in particular, the "sound scholarship and competent teaching" standards are expanded, by virtue of being defined by 3.91, to cover the charged conduct here, those regulations are unconstitutionally vague because they did not give him fair and adequate notice that that conduct could lead to dismissal.[7] As the Supreme Court

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6. To the extent that plaintiff seems to suggest that as to certain of the charges the Board of Governors found that he violated University rules and regulations and was insubordinate, the same reasoning applies. Neither violation of rules and regulations or insubordination are currently bases for dismissal, and proposals to that effect were vigorously opposed by the faculty. Indeed, the proposed revisions which have been pending for more than three years make only "gross disregard" of regulations a dismissible offense and do not even mention insubordination.

7. If 3.91 is not subsumed within or does not otherwise define "sound scholarship and competent

observed, albeit in the context of a criminal statute,[8] "there can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive expansion of narrow and precise statutory language. Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). The argument here is that reasonably precise language -- "sound scholarship and competent teaching" -- has been expanded by virtue of the unforeseeable and retroactive gloss which Rutgers has placed on it by attempting to slip in 3.91.

Certainly, the history of the dismissal regulations and, aside from a conviction of a crime involving moral turpitude, the aborted efforts to make ethical violations the basis for a dismissal decision, indicate, at least to me, that it was "unforeseeable" that Rutgers would use ethical violations, albeit segued into the "sound scholarship and competent teaching language," to dismiss San Filippo and, thus, that he was deprived of his right of fair warning.

Rutgers, however, points me to Korf v. Ball State University, 726 F.2d 1222 (7th Cir 1984), in which the Statement on Professional Ethics was found to have adequately notified Korf that what he described as "consensual sexual relationship" with students was cause for dismissal. Korf "should have understood both the standards to which he was being held and the consequence of his conduct." Id. at 1228. "[I]t is unreasonable to assume that the drafters of the Statement on Professional Ethics could and must

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teaching," even Rutgers does not suggest that Professor San Filippo could be dismissed under any other of the very specific offenses set forth in 3.97.

8. The void for vagueness doctrine applies in civil as well as criminal cases. Boutilier v. INS, 387 U.S. 118, 123 (1967).

specifically delineate every type of conduct (including deviant conduct) constituting a violation." Id. at 1227.

I wholly agree, but those observations do not address the issue before me. San Filippo is not arguing that the Statement on Professional Ethics set forth in 3.91 was not specific enough to cover the types of conduct with which he was charged and, indeed, is not seriously arguing that the charges which were found to be "true" did not constitute violations thereof. He argues that ethical violations are not dismissible offenses, whether charged as a violation of 3.91 or charged as "defining" a violation of 3.97 where there is little or no evidence of any dismissible offense aside from the evidence of ethical violations. Korf, in any event, is eminently distinguishable because Ball State, unlike Rutgers, apparently had specifically adopted the Statement on Professional Ethics as an enforceable set of rules violation of which, in and of itself, could lead to dismissal. Moreover, Korf did not argue that violation of the ethical rules could not be a basis of dismissal but only that the rules were vague as applied to his conduct.

Rutgers also cites a host of cases -- also irrelevant -- which held that various "catch-all" standards -- "for such cause as will promote the efficiency of the service" (Arnett v. Kennedy, 416 U.S. 134 (1974)); "jeopardize the health, safety and welfare" (Pesce v. J. Sterling Morton High School District, 830 F.2d 789 (7th Cir. 1987)); "adequate cause" (Garrett v. Mathews, 625 F.2d 658 (5th Cir 1980), aff'g per curiam, 474 F. Supp. 594 (N.D. Ala. 1979)); "other due and sufficient cause" (diLeo v. Greenfield, 541 F.2d 949 (2d Cir. 1976)) -- and so on -- were not unconstitutionally vague as applied to the conduct at issue in those cases.

But Rutgers has no such "catch-all" provision in its dismissal regulations much less one which would permit it to terminate a faculty member because he or she acted unethically. Significantly, it had such a provision -- "conduct reprehensible and detrimental to

the University" -- at one time but deleted it in 1967 and inserted the much more specific "convicted of a crime involving moral turpitude," an insertion which, as noted earlier, makes no sense if the Board believed it was incorporating the statement on Professional Ethics into its dismissal regulations. (Second McNatt Aff. Exh. B, E).

Moreover, 3.93 states that a faculty member can be dismissed only for "adequate cause as defined in 3.94" (emphasis added) and Rutgers, in Villiers and Leaf, further narrowed the grounds on which dismissal may be based to those articulated in 3.97 which has no catch-all provision. And while I could easily find that 3.91, the supposed catch-all "provision," fairly and adequately conveys its meaning and would "catch" the conduct evidenced here, 3.91, pure and simple, is not a dismissal regulation.

"[S]tandards of sound scholarship and competent teaching" cannot include ethical violations committed by a scholar and a teacher even in the academic setting absent embodying the ethical requirements of 3.91 in those standards, as the common sense definitions of those standards in Appendix D of the University's Academic Reappointment and Promotion Policy indicate. See Friedman Aff. Exh. 23. Rutgers, it appears, is attempting to come in by the back door after refusing, for years, to come in by the front. As applied to the conduct charged in this case, "failure to maintain standards of sound scholarship and competent teaching" is void for vagueness.

One final note. While, in my view, a University's dismissal standards should permit the option of dismissal where a faculty member "exploits and abuses students and other scholars working under his supervision, lies, cheats, and shows flagrant disregard for University administrative policies and directives," as Rutgers describes Professor San Filippo's conduct, Defendants' Br. in Support of Motion for Summary Judgment at 36,

Rutgers' standards do not do so. The fault, if fault it be, lies squarely with the faculty which has effectively blocked every attempt by the administration to beef up the dismissal standards to cover conduct which, particularly in the purely academic setting, is alien to any concept of how civilized professionals should comport themselves.

Perhaps this resistance is, in part, a recognition that "there but for the grace of God go I." Certainly, there is a belief among certain of the highest ranking faculty members that "dismissal procedures bear the same relationship to University operations as capital punishment does to the crime problem -- both are largely a matter of public relations and an escape valve for venting aggression and misplaced emotional fervor" -- a "public relations challenge to the administration and little more." See, e.g., Friedman Aff. Exh. 8. If what is important to the faculty at Rutgers is public relations, so be it, but the San Filippos of this world will remain in their midst. The taxpayers and, more importantly, the students who, it should not be forgotten, learn by example deserve far more.

Plaintiff's motion for summary judgment on the vagueness claim will be granted and defendants' motion on that ground, as well as their motion to strike affidavits and exhibits, will be denied.9

---

9. Given the disposition herein, the remaining potpourri of motions, save one, need not be decided. That one, i.e., defendants' motion to strike the damage claims, will be granted in part and denied in part. With reference to punitive damages and, aside from whether, as a matter of law, punitive damages are available against Rutgers and the individual defendants in their official capacity, there is no allegation that the members of the Board of Governors named as defendants did anything wrong other than to adopt the Senate panel's recommendation to terminate plaintiff on a ground which, as a legal matter, I have found to be

An appropriate order shall issue.

Maryanne Trump Barry, U.S.D.J.

Dated: July 25, 1990

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impermissible. Certainly, there is no allegation of malice or of willful, wanton conduct and Rutgers can have no malice apart from that of its officials. Defendants' motion to strike the punitive damage claim will be granted.

Similarly, defendants' motion to strike plaintiff's claim for front and back pay and for research grants will be granted. Plaintiff obtained new employment at a higher salary without any interim period of unemployment and any monetary loss from the plaintiff. Defendants' motion to strike plaintiffs claim as to loss of consulting fees, a close question given that plaintiff's evidence on this item borders on the speculative, will be denied. Plaintiff's claim for emotional distress damages has not been challenged.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH SAN FILIPPO, JR.,	:	
Plaintiff,	:	
	:	Civil Action No. 88-2575
vs.	:	ORDER
MICHAEL BONGIOVANNI, ANTHONY S. CICATIELIJO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY,	:	
Defendants.	:	

This matter being opened to the court on plaintiff's motion for summary judgment on the vagueness and due process claims, and defendants' motion for summary judgment on a host of claims and, in the alternative, to strike plaintiff's claim for damages, and defendants' motion to strike plaintiff's claim for damages, and defendants' motion to strike affidavits and exhibits relied on by plaintiff; and the court having heard oral argument and in consideration of the submissions of counsel and for good cause shown;

It is on this 25th day of July, 1990 for the reasons expressed in this court's opinion of even date,

ORDERED that plaintiff's motion for summary judgment on the vagueness claim is hereby granted; and it is further

ORDERED that defendants' motions for summary judgment on the vagueness claim and to strike affidavits and certain exhibits, are hereby denied; and it is further

ORDERED that defendants' motion to strike plaintiff's claim for punitive damages is hereby granted; and it is further

ORDERED that defendants' motion to strike plaintiff's claim for punitive damages is hereby granted; and it is further

ORDERED that defendants' motion to strike plaintiff's claim for front and back pay and for research grants is hereby granted; and it is further

ORDERED defendants' motion to strike plaintiff's claim as to loss of consulting fees is hereby denied.

MARYANNE TRUMP BARRY
U.S.D.J.

APPENDIX D

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Attorneys for Defendants
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hon. Maryanne Trump Barry

JOSEPH SAN FILIPPO, JR.,	:	
Plaintiff,	:	Civil Action
	:	No. 88-2575
vs.	:	
MICHAEL BONGIOVANNI, ANTHONY S. CICATIELIJO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY,	:	
Defendants.	:	

CONSENT ORDER AMENDING JULY 25, 1990
ORDER TO INCLUDE 28 U.S.C. 1292(B)
STATEMENT AND STAYING ACTION

This matter having been brought before the court on defendants' motion for a 28 U.S.C. 1292(b) statement and stay; plaintiff, through his counsel, having consented to the entry of this Order; and good cause appearing therefor,

IT IS on this 20th day of September, 1990,

ORDERED that this Court's Order of July 25, 1990 be and the same is hereby amended as follows:

> STATED, pursuant to 28 U.S.C. 1292(b) and Rule 23 of the Rules of the United States Court of Appeals for the Third Circuit, that the within Order, in its grant of summary judgment to the plaintiff determining that Rutgers, The State University's dismissal regulations are unconstitutionally vague, involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the termination of the litigation;

and it is further

ORDERED that, should the defendants or any of them timely petition the United States Court of Appeals for the Third Circuit for permission to appeal from the July 25, 1990 Order, as amended hereby, under 28 U.S.C. 1292(b) and Fed. R. App. P. 5, and should such petition be granted, the proceedings in this Court in this action are stayed in their entirety pending resolution of the petition and pending disposition of the appeal.

MARYANNE TRUMP BARRY
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Misc. No. 90-8095 October 12, 1990
#D-31

JOSEPH SAN FILIPPO, JR.,
vs.
Michael Bongiovanni, et al., Petitioners
(Related to Newark, NJ D.C. Civil No. 88-2575)

Present: HIGGINBOTHAM, Chief Judge and
MANSMANN, Circuit Judge.

Petition by Petitioners for permission to appeal from interloutory order certified pursuant to 28 U.S.C. 1292(b),

_____
Deputy Clerk 7-5019

----------ORDER----------

The foregoing Motion by Petitioners for permission to appeal from interlocutory order certified pursuant to 28 U.S.C. 1292(b) is Granted.

By the Court,

_____
Circuit Judge

Dated: Dec 19 1990

(2)

No. 92-135

Supreme Court, U.S.
F I L E D
SEP 1 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH SAN FILIPPO,

Petitioner,

vs.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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LINDA B. CELAURO
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September, 1992

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the court of appeals correctly apply the Court's controlling vagueness doctrine principles articulated in *Arnett v. Kennedy*, 416 U.S. 134 (1974), its progenitors, and its progeny, in determining that the dismissal standard of Rutgers, The State University of New Jersey, of "failure to maintain standards of sound scholarship and competent teaching" is sufficiently clear to give fair warning to a tenured faculty member that he could be discharged: for his exploitative and abusive treatment of research scholars recruited by him from the People's Republic of China to work in his university laboratories; for his abusive treatment of his doctoral advisee-teaching assistant in the presence of students; for his misrepresentations to his research scholar concerning health insurance coverage; for his improper charges against research accounts; for his misrepresentations to the university regarding the credentials of a research scholar working in his university laboratory and paid by a federally funded grant; for his misrepresentations to the university's graduate program regarding the authenticity of a letter of recommendation for an applicant; and for his direct defiance of his department chair's directive issued to protect students.

LIST OF PARTIES

Petitioner:

Joseph San Filippo

Respondents:

Rutgers, The State University*

Michael Bongiovanni

Anthony S. Cicatiello

Adrienne S. Anderson

Donald M. Dickerson

Floyd H. Bragg

Norman Reitman

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* Rutgers, The State University of New Jersey, has no parent or subsidiary corporations.

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The Third Circuit Decision does not Conflict with the Court's Decisions or the Decision of any Court of Appeals and does not Present any Special and Important Question not Previously Settled by the Court, but Simply Constitutes a Correct Application of the Supreme Court's Controlling Principles Established in *Arnett v. Kennedy*, 416 U.S. 134 (1974), Its Progenitors, and Its Progeny, in Concluding that Rutgers' Dismissal Standard as Applied to Dr. San Filippo is Not Void for Vagueness	8
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No. 92-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH SAN FILIPPO,

Petitioner,

vs.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari. The petition raises no conflict between the Third Circuit's decision and the decisions of the Court or the decisions of any other court of appeals and raises no special and important issue not previously settled by the Court. The petition merely seeks review of the court of appeals' correct application of the Court's controlling vagueness doctrine principles articulated in *Arnett v. Kennedy*, 416 U.S. 134 (1974), its progenitors, and its progeny, in the resolution of the fact-specific issue of whether a state university's dismissal standard

fairly warned a tenured faculty member that he could be discharged for the conduct with which he was charged. Further, contrary to petitioner's assertion (P2),[1] the court of appeals did not refuse to consider the Court's application of the vagueness doctrine in *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991). Rather, the court of appeals, having had the benefit of supplemental submissions on *Gentile*, applied the same vagueness doctrine principles applied in *Gentile* as established by a wealth of other decisions of the Court, including *Grayned v. City of Rockford*, 408 U.S. 104 (1972), cited by both *Gentile*, 111 S. Ct. at 2731, and the court of appeals (PA28).[2]

STATEMENT OF THE CASE

A. *Proceedings Below*

Petitioner Joseph San Filippo ("Dr. San Filippo") was employed as a tenured faculty member in chemistry by respondent, Rutgers, The State University of New Jersey ("Rutgers" or "University"), until he was dismissed, on May 13, 1988, for a "failure to maintain standards of sound scholarship and competent teaching" by Rutgers' Board of Governors[3] (PA7, 44).

On June 13, 1988, Dr. San Filippo instituted this action, under 42 U.S.C. §1983, alleging his dismissal violated several federal and state constitutional rights and asserting a pendent state contract claim (PA46-47). Rutgers and the other respondents moved for summary judgment on all claims (PA47-48). Dr. San Filippo moved for partial summary judgment on his claim that Rutgers' dismissal standard was unconstitutionally vague and on his claim that the dismissal proceeding deprived him of procedural due process (PA47-48). The district court granted Dr. San Filippo's motion on the vagueness claim and denied Rutgers'

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[1] "P" refers to the Petition.

[2] "PA" refers to the Petition Appendix.

"A" will be used to refer to the Appendix filed with the United States Court of Appeals for the Third Circuit.

[3] The six individually-named respondents are the six members of Rutgers' Board of Governors who voted in favor of Dr. San Filippo's dismissal (PA46

and the other respondents' motion on the vagueness claim, determined the remainder of the liability issues need not be decided, and granted Rutgers' and the other respondents' motion to strike Dr. San Filippo's damages claims for front pay, back pay, research grants, and punitive damages (PA62, 62 n.9).

Pursuant to 28 U.S.C. §1292(b), the district court certified the vagueness issue and the court of appeals granted permission to Rutgers and the other respondents to appeal (PA67, 68).

The Third Circuit succinctly stated: "The sole question before us on this certified appeal is whether the University's regulations were indeed too vague to meet the fair notice requirement incorporated in the due process clause of the Fourteenth Amendment to the Constitution." (PA3-4).

Applying 67 years of the Court's controlling decisions (PA25 to 29), the Third Circuit determined:

> Under these decisions, while Rutgers dismissal regulations are broad and general, they are not unconstitutionally vague. Dismissal for failure to maintain "standards of sound scholarship and competent teaching" does not fail to specify *any* standard for dismissal but rather provides a standard which encompasses a wide range of conduct. We reject the district court's narrow reading of this standard based on the absence of a "catch-all" provision in Rutgers' dismissal regulations, and embrace the "common sense" approach of *Arnett* and its progeny. Professors at Rutgers can evaluate their behavior's conformity to the dismissal regulations. A reasonable, ordinary person using his common sense and general knowledge of employer-employee relationships would have fair notice that the conduct the University charged Dr. San Filippo with put him at risk of dismissal under a regulation stating he could be dismissed for "failure to maintain standards of sound scholarship and competent teaching." Regulation 3.94. He would know that the standard did not encompass only actual teaching or research

> skills. Here all of Dr. San Filippo's charged actions sprang from his role as a faculty member at the University. It is not unfair or unforeseeable for a tenured professor to be expected to behave decently towards students and coworkers, to comply with a superior's directive, and to be truthful and forthcoming in dealing with payroll, federal research funds or applications for academic positions. Such behavior is required for the purpose of maintaining sound scholarship and competent teaching. The academic community can reasonably conclude that otherwise the educational atmosphere is likely to become so tainted and disturbed that it would become impossible to "maintain standards of sound scholarship and competent teaching." *Id.*

(PA30).

B. *Facts*

The sole issue determined by the Third Circuit was that the express language of the University dismissal standard is not unconstitutionally vague as applied to Dr. San Filippo. The only facts relevant to that issue are the language of the dismissal standard, "failure to maintain standards of sound scholarship and competent teaching," and the conduct with which Dr. San Filippo was charged as violating that standard. The detailed charges of misconduct are set out in both lower court opinions (PA10-14, 40-42).

All other "facts" asserted by Dr. San Filippo in the Petition are not relevant to the vagueness issue, were not determined or relied upon by the Third Circuit in reaching its decision, or are vigorously contested by the respondents and have yet to be decided by the district court as they may relate to Dr. San Filippo's claims in the case other than the vagueness claim.

Rutgers' Board of Governors sustained each of the charges found to be true by a hearing panel of Dr. San Filippo's faculty

peers[4] (after a 46-day hearing) and specified how each instance of conduct in the sustained charges constituted a "failure to maintain standards of sound scholarship" (PA14-21), as the Board stated in its decision:

> Sustained Charge 1a concerned the exploitation of Mr. Hetian Gao and Mr. Changhe Xiao, "by directing them or by leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985." As visiting scholars from the People's Republic of China, Messrs. Gao and Xiao came to the United States for further training and study and relied upon Professor San Filippo to be their "intellectual guide and counselor," but instead were subjected to "exploitation" "for his private advantage." Sustained Charge 1d concerned threats and harassment against the visiting Chinese scholars "by [Professor San Filippo] repeatedly stating" that he "would send them back to China" and "by [his] directing abusive language toward them." Sustained Charge 1e concerned Professor San Filippo's interruption of a class taught by graduate student and Teaching Assistant Zong Ping Chen, and his subsequent "unprofessional, threatening and abusive" treatment of her, which treatment was "within the hearing of other individuals, including her students." The other sustained charges, in the Board's view, also constitute a clear "failure to maintain standards of sound

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[4] All of Dr. San Filippo's faculty peers at Rutgers who reviewed the charges of Dr. San Filippo's misconduct concluded the alleged acts constituted dismissible offenses under Rutgers regulations (A113, 985 n.2, 51, 52-3, 36-8, 892, 940). In so concluding, Dr. San Filippo's peers were performing their responsibilities under the University's dismissal regulations. The University's dismissal regulations provide for recommendations for dismissal to the president of the University by two separate groups of a professor's faculty peers (the academic department and the dean's faculty advisory group) and three academic officers of the university (PA8-9 n.5). After the president issues the formal charges, the professor has a hearing before his faculty peers (PA9 n.5).

scholarship and competent teaching," and therefore also meet the standards for a dismissible offense under applicable University regulations. . .

* * *

. . . All of these charges flow directly out of Professor San Filippo's activities as a scholar and teacher and constitute serious ethical violations of his responsibilities in these areas. Sustained Charge 1c, for example, involving the lack of provision of health benefits despite representations to the contrary, along with Charge 2, in which the facts establish that Professor San Filippo directed an injured Chinese visiting scholar without medical coverage to impersonate one who was so covered, both concern Professor San Filippo's responsibilities as a teacher and scholar. The employment of such visiting scholars in faculty research is a routine part of contemporary university teaching and research, especially in the sciences. The serious lack of ethics in the employer-employee relationship found here constitutes adequate ground for finding a lack of maintenance of "standards of sound scholarship and competent teaching." Especially when foreign nationals are involved, such individuals primarily rely on the guidance of the faculty member concerned to determine the proper parameters of the employment relationship.

The teacher-scholar role also commonly encompasses supervision of other employees. Therefore, sustained Charge 3b concerning Professor San Filippo's attestation that Ms. Marilyn Brownawell, an employee of his, had worked during a week when she had in fact performed no such work falls into this category and evidences a failure to maintain "standards of sound scholarship and competent teaching."

Sustained Charge 4, involving the miscategorization of Peng Zhou as a postdoctoral fellow, concerns the

responsibility of a teacher-scholar to act ethically in regard to the administration of his federal grant and in regard to University policy as respects the guidelines for defining such positions, and likewise can be considered to be a failure to maintain "standards of sound scholarship and competent teaching."

Sustained Charge 5, involving Professor San Filippo's submission of a letter of recommendation on behalf of Peng Zhou under circumstances in which the authorship and authenticity of the submitted material was found to be misrepresented, directly impacts on Professor San Filippo's responsibilities as a teacher who is part of a graduate program which depends in large part on the integrity of the faculty recommendation process. Therefore, his actions in this incident demonstrate a failure to maintain "standards of sound scholarship and competent teaching."

Sustained Charge 6 concerned Professor San Filippo's disobedience of the specific directive of a memorandum addressed to him by his departmental chairman. In that memorandum, Professor Boikess mandated that Professor San Filippo not permit additional graduate students work in his laboratory due to the seriousness of the allegations made against him regarding treatment of such individuals. The source of the directive was well-based concern for the students involved. Professor San Filippo's defiance of that directive was a clear failure to maintain "standards of sound scholarship and competent teaching."

(A1033-34, 1036-38).

REASONS FOR DENYING THE WRIT

THE THIRD CIRCUIT DECISION DOES NOT CONFLICT WITH THE COURT'S DECISIONS OR THE DECISION OF ANY COURT OF APPEALS AND DOES NOT PRESENT ANY SPECIAL AND IMPORTANT QUESTION NOT PREVIOUSLY SETTLED BY THE COURT, BUT SIMPLY CONSTITUTES A CORRECT APPLICATION OF THE SUPREME COURT'S CONTROLLING PRINCIPLES ESTABLISHED IN *ARNETT V. KENNEDY*, 416 U.S. 134 (1974), ITS PROGENITORS, AND ITS PROGENY, IN CONCLUDING THAT RUTGERS' DISMISSAL STANDARD AS APPLIED TO DR. SAN FILIPPO IS NOT VOID FOR VAGUENESS

Dr. San Filippo has failed to identify any conflict between the court of appeals' decision and the Court's controlling decisions establishing, articulating, and applying the vagueness doctrine. Rather, Dr. San Filippo's basis for seeking the Court's discretionary review is his "astonishment" (P21) that the Third Circuit, in applying the Court's well-established vagueness doctrine standards to the case at hand, could possibly find that the dismissal standard of "failure to maintain standards of sound scholarship and competent teaching" fairly warned a university professor that he could be discharged for his complete lack of integrity in dealing with his research workers, research funds, and the university through his abuse of power and authority derived from his role as a teacher and a scholar. Astonishment of a party is not a sufficient basis for a party to seek the Court's exercise of its discretionary jurisdiction.

The purpose of the vagueness doctrine is to avoid "trap[ping] the innocent by not providing fair warning," not to rescue the guilty. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). An enactment is unconstitutionally vague only if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). No one, especially not scholars and teachers of "common intelligence" at a research university, need

guess that a professor's abuses of the extraordinary freedom, power, and authority permitted him in fulfilling his scholarship and teaching obligations – by exploiting and abusing research scholars under his direction and control, abusing his teaching assistant and doctoral advisee in the presence of students, making misrepresentations regarding a research scholar's credentials, making misrepresentations to the university's graduate program, misdealing with federal research funds, and flouting a superior's directive designed to protect students – constitute direct violations of "standards of sound scholarship and competent teaching."

Contrary to Dr. San Filippo's assertion (P24), there was no impropriety in the Third Circuit's reliance upon *Arnett v. Kennedy*, 416 U.S. 134 (1974), in applying vagueness doctrine standards to a dismissal standard for a public employee. *Arnett* did not redefine or reinvent the vagueness doctrine. *Arnett* simply applied the Court's well-established vagueness doctrine standards "in the public employment context" as did the Third Circuit (PA27-28). Both *Arnett*, 416 U.S. at 159, and the Third Circuit (PA27-28) relied upon principles previously articulated by the Court in cases such as *CSC v. Letter Carriers*, 414 U.S. 548, 578-9 (1973) ("there are limitations in the English language with respect to being both specific and manageably brief;" if the prohibitions "are set out in terms that the ordinary person exercising common sense can sufficiently understand and comply with," the enactment "will not be struck down as vague."). The Third Circuit also relied upon identical principles articulated by other controlling decisions by this Court: *Grayned*, 408 U.S. at 110 ("Condemned to the use of words, we can never expect mathematical certainty from our language.") (PA28); *Connally*, 269 U.S. at 391 (the measure of vagueness is whether the language is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application") (PA27).[5]

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[5] Dr. San Filippo also errs in his assertion that the Court only upheld the *Arnett* standard because there was a federal personnel manual. (P24). As stated by the Third Circuit:

(Footnote continued)

Dr. San Filippo is also incorrect in his assertion that "the Third Circuit completely overlooked and ignored this Court's recent decision in *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991). After oral argument before the court of appeals, Dr. San Filippo's counsel submitted the *Gentile* decision and a July 5, 1991 letter brief discussing *Gentile* to the Third Circuit, pursuant to Fed. R. App. P. 27(j). A July 12, 1991 responding letter brief was submitted by counsel for Rutgers and the other respondents. Therefore, the Third Circuit's failure to cite *Gentile* does not mean that the court did not consider it and did not rely upon the same vagueness doctrine principles relied upon by the Court in *Gentile*. In determining whether the safe harbor provision of a Nevada Supreme Court rule governing attorneys' speech was void for vagueness, the Court in *Gentile* applied the well-established standard of whether the provision provided ' " 'fair notice to those to whom [it] is directed,' " ' quoting from *Grayned*, 408 U.S. at 112. 111 S. Ct. at 2731. Thus, the vagueness doctrine standard applied in *Gentile* was not newly established in *Gentile*. Both the principle of fair notice, for which the Third Circuit cited *Colten v. Kentucky*, 407 U.S. 104, 110 (1972), and the case of *Grayned* were relied upon by the Third Circuit (PA26-27, 28). Hence, the Third Circuit's failure to cite *Gentile* and dozens of other cases in which the Court has applied the vagueness doctrine analysis is not a basis for concluding that the Third Circuit has failed to apply the Court's well-established vagueness doctrine principles.

Moreover, *Gentile* applied established precedent to a set of issues which has no analogy to the issues in the current

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> We do not believe the manual's existence was the basis for the [C]ourt's holding [in *Arnett*], however. It simply acknowledged the manual in a footnote to demonstrate that it could aid employees in ascertaining the "longstanding principles" of employer-employee relationships to guide them in their behavior. *See Arnett*, 416 U.S. at 160 n.24. Further, the language in the manual shows the breadth of the regulation but does not make it any more specific. *See id.* The court in *Wishart v. McDonald*, 500 F.2d 1110, 1116 (1st Cir. 1974) similarly construed the *Arnett* holding.

(PA28-29 n.15).

matter. The rule challenged in *Gentile* governed "pure speech." 111 S.Ct. at 2724. Thus, the rule in *Gentile* was also challenged as violating the First Amendment. *Id.* Dr. San Filippo's misconduct for which Rutgers dismissed him was not speech. Thus, Dr. San Filippo has not challenged Rutgers' dismissal standard either as overly broad or as directly violating the First Amendment. As the Third Circuit noted:

> In the university context, First Amendment issues sometimes arise with respect to academic freedom. This, however, does not affect our decision today. Dr. San Filippo does not raise an overbreadth challenge to the University regulations. He was not dismissed, nor does he allege that he was dismissed, for any reason relating to anything that could be considered a free expression issue.

(PA26 n.14). Thus, the Petition raises no First Amendment issue. The significance of the distinction in the factual application is the degree of specificity required by the vagueness doctrine standard. The Court has stated that, where a statute regulates speech, a stricter level of precision is required under the vagueness doctrine to ensure that permissible First Amendment freedoms are not inhibited. *Grayned*, 408 U.S. at 109, 109 n.5. Similarly, the Court stated in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-9 (1982):

> The degree of vagueness that the Constitution tolerates — as well as the relative importance of fair notice and fair enforcement — depend in part on the nature of the enactment. . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. . . .
>
> Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

Hence, the stricter degree of precision required of the rule in *Gentile* due to its restriction of speech has no applicability to the dismissal standard involved in this case.

Finally, Dr. San Filippo is correct that the Third Circuit concluded that the express language of the dismissal standard "failure to maintain standards of sound scholarship and competent teaching" is sufficiently clear on its face to have fairly warned Dr. San Filippo that he could be dismissed for his conduct, without the need to resort to "interpretive guides" such as legislative history, other university policies, rules, or regulations, or previous applications (P26, PA22-23, 31). However, Dr. San Filippo is incorrect in his assertion (P26) that if the Third Circuit had resorted to these "interpretive guides," it would have concluded differently.

If the Third Circuit had found it necessary to consider the purported previous applications to Professors Villiers and Leaf (P28-29), it would have found no interpretive guidance. Those professors were charged with violation of a different dismissal standard, "gross neglect of established university obligations appropriate to the appointment," not with "failure to maintain standards of sound scholarship and competent teaching," the dismissal standard applied to Dr. San Filippo (A385, 390).

If the Third Circuit had found it necessary to look to other university policies, rules, and regulations for more explicit definition of "standards of sound scholarship and competent teaching," it would have looked to University Regulation 3.91 wherein Rutgers adopted the code of the nationally organized professoriate to prescribe the standards of sound scholarship and competent teaching expected of Rutgers' faculty (A976-978),[6]

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[6] University Regulation 3.91 states:

> [E]very member of the faculty of this University is expected . . . . *to maintain standards of sound scholarship and competent teaching*. He shall conduct himself in accordance with the standards of professional ethics set forth in paragraphs I to V, inclusive, of the Statement on Professional Ethics adopted by the

(Footnote continued)

and not, as Dr. San Filippo does (P27-28), to a university policy statement interpreting five promotion criteria: "teaching

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American Association of University Professors at its annual meeting, April 1966.

Statement on Professional Ethics

"I. The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognizes the special responsibilities placed upon him. His primary responsibility to his subject is to seek and to state the truth as he sees it. To this end he devotes his energies to developing and improving his scholarly competence. He accepts the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. He practices intellectual honesty. Although he may follow subsidiary interests, these interests must never seriously hamper or compromise his freedom of inquiry.

"II. As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

"III. As a colleague, the professor has obligations that derive from common membership in the community of scholars. He respects and defends the free inquiry of his associates. In the exchange of criticism and ideas he shows due respect for the opinions of others. He acknowledges his academic debts and strives to be objective in his professional judgment of colleagues. He accepts his share of faculty responsibilities for the governance of his institution.

"IV. As a member of his institution, the professor seeks above all to be an effective teacher and scholar. Although he observes the stated regulations of the institution, provided they do not contravene academic freedom, he maintains his right to criticize and

(Footnote continued)

effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general usefulness to the University." (A405-410).

Finally, if the Third Circuit had found it necessary to resort to the legislative history of the University's regulations, it would have found solid support for its conclusion that the dismissal standard of "failure to maintain standards of sound scholarship and competent teaching" has always applied to all conduct in which a faculty member is empowered to engage by virtue of his professional role as a teacher and scholar. The legislative

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> seek revision. He determines the amount and character of the work he does outside his institution with due regard to his paramount responsibilities within it. When considering the interruption or termination of his service, he recognizes the effect of his decision upon the program of the institution and gives due notice of his intentions.
>
> "V. As a member of his community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession, and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom."

(A976-977) (emphasis added). This "Statement on Professional Ethics" adopted by Rutgers' Board of Governors in 1967 was expressly understood by its original propounders to define broadly the responsibilities inherent in teaching and scholarship. The 1940 "Statement of Principles on Academic Freedom and Tenure," by the American Association of University Professors and the Association of American Colleges, and universally recognized as the standard for the profession nationwide, stated: "Academic freedom . . . applies to both teaching and research . . . . It carries with it duties correlative with rights." (A9). The 1970 "Interpretive Comments," issued by these same two bodies for the guidance of the profession in applying the 1940 policy statement, expressly interpreted the teaching and research duties of the members of the professoriate to include adherence to the standards of conduct set forth in the American Association of University Professors' "Statement on Professional Ethics." (A9 n.2, A11, par. 1).

history unequivocally shows that Dr. San Filippo's assertion (P26-27) that a single dismissal standard was changed from "reprehensible and detrimental" conduct to "failure to maintain standards of sound scholarship and competent teaching" is purely and simply factually incorrect. Thus, his interpretation of that nonexistent "fact" as "an effort to restrict the reach of the rules to a narrower compass" (P26) is an interpretation without basis. Since the first Rutgers' Board of Governors enacted the University regulations in 1957, the University regulations have always required a professor to accord his professional conduct to "standards of sound scholarship and competent teaching," and have made a failure to do so a ground for dismissal (A643, 647-648, 650-651, 653-654, 663). The same regulations always have provided also a separate prescriptive and proscriptive standard for a faculty member's conduct as a private citizen. Prior to 1967, the regulations required a faculty member to conform his private conduct to behavior that was not "detrimental and reprehensible to the University," and provided for his dismissal for conduct in his private life "detrimental and reprehensible" to the University (A643, 648). Since 1967, the regulations have required a faculty member to conform his private conduct to "standards dictated by law," and have provided for his dismissal for conduct in his private life that led to a "conviction of a crime involving moral turpitude." (A651, 653, 663).

The Third Circuit did not err in concluding, without relying upon other regulations, legislative history, and prior applications, that professors "exercising common sense can sufficiently understand,"[7] even if not informed by "interpretive guides," the language "standards of sound scholarship and competent teaching" extends to professional life outside the four walls of the classroom and to measures of sound scholarship and competent teaching beyond technical proficiency. Even Dr. San Filippo concedes that the standard of "failure to maintain standards of sound scholarship and competent teaching" would

[7] *CSC v. Letter Carriers*, 414 U.S. at 579.

"cover sex harassment of a student," because the misconduct is made possible by the power the professor derives from the "scholarship or teaching relationship." (P29-30). Having conceded that, logically then, Dr. San Filippo must concede that, in a research institution and especially in the heavily federally-funded research sciences, a professor has extraordinary, unfettered freedom and power over students, employees, and monetary expenditures in the pursuit of scholarly research in the name of academic freedom. The exercise of that freedom and power is central to a professor's role as a teacher and a scholar. The abuse of the freedom and authority that fosters such scholarship and teaching activities is a violation of "standards of sound scholarship and competent teaching."

Each of Dr. San Filippo's transgressions was made possible by his role as a teacher and a scholar, flowing from his supervision of his grant-funded research and from the authority conferred upon faculty members by the University with respect to its graduate program.

So empowered as a teacher and scholar, Dr. San Filippo recruited research scholars from Jilin and Nankai Universities in the People's Republic of China to assist him in his federal grant-supported scholarly research at Rutgers. Upon their arrival in the United States, Dr. San Filippo greeted these visiting scholars with intimidation, verbal abuse, and threats to return them to China in disgrace if they did not submit to his will. In this coercive environment, Dr. San Filippo "invited" these Chinese scholars to his home and assigned them manual labor, including gardening and cleaning, which they performed.

So empowered as a teacher and a scholar, Dr. San Filippo had promised to purchase health insurance with $700 he deducted from a Chinese scholar's (Changhe Xiao) salary. The insurance was not purchased. Thus, when Mr. Xiao fell from a ladder and injured his back while washing the porch and windows of Dr. San Filippo's home on the Fourth of July, he had no medical insurance coverage. After a four-day delay in obtaining medical attention for Mr. Xiao, Dr. San Filippo obtained

emergency hospital treatment by having Mr. Xiao use the insurance card of Mr. Peng Zhou, another research scholar recruited by Dr. San Filippo from Jilin University.

So empowered as a teacher and a scholar, Dr. San Filippo interrupted a laboratory class taught by a teaching assistant, Ms. Zong Ping Chen, his own doctoral student, and verbally berated her in the hearing of her students.

So empowered as a teacher and a scholar, Dr. San Filippo brought Mr. Peng Zhou to Rutgers as a postdoctoral fellow, charging the postdoctoral stipend to a federal grant-funded account, knowing that Mr. Zhou did not have a doctoral degree.

So empowered as a teacher and a scholar, Dr. San Filippo permitted a research technician working in his mass spectrometry laboratory to submit a false time report to Rutgers for wage payment.

So empowered as a teacher and a scholar, Dr. San Filippo submitted a letter of reference to the graduate program, in support of Mr. Peng Zhou's admission, knowing that the letter had not been prepared or signed by the individual whose purported signature appeared on the letter.

So empowered as a teacher and a scholar, Dr. San Filippo permitted three graduate students to work in his laboratory in direct defiance of the department chair's directive which had been issued to protect the students' welfare.

The dismissal standard of "failure to maintain standards of sound scholarship and competent teaching" gave Dr. San Filippo fair warning that he could be dismissed for his misconduct. The Third Circuit correctly applied the Court's well-established vagueness doctrine principles in reaching its conclusion. The issue does not warrant further review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1992

No. 92-135

MOTION FILED
SEP 4 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH SAN FILIPPO,

Petitioner,

vs.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as member of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER AND MOTION FOR LEAVE TO FILE THE BRIEF

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September 1992

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Rutgers Council of AAUP Chapters; the Professional Staff Congress of CUNY, AAUP/AFT; the Connecticut State University AAUP; the Professional Staff Association/AAUP of NJIT; Western Michigan University AAUP; California Faculty Association, AAUP/NEA; and the Congress of Connecticut Community Colleges AAUP hereby move for leave to file their brief *amicus curiae* in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit. The Petitioner has consented to this filing; the Respondents have not consented.

The grounds for this motion are:

THE INTERESTS OF THE MOVANTS

The Rutgers Council of AAUP Chapters represents faculty members for purposes of collective negotiations at Rutgers, the State University. It is affiliated with the *American Association of University Professors. In both capacities the Rutgers AAUP is dedicated to the preservation of academic freedom.

Academic freedom may thrive only where there is academic tenure, to protect faculty members from discharge by whimsical governing bodies. The promise not to fire professors except for specified causes guarantees that they will engage in teaching, research and other professional and personal activities without fear lest their speech or their conduct serve as a reason for dismissal. Rutgers AAUP believes that faculty members with unpopular views and unpleasant personalities must be

given room to flourish, so that the pall of orthodoxy does not choke off their teaching and scholarship.

Fundamental to the need to provide faculty members with the broadest possible arena for exercise of their ideas is clarity about the boundaries of permissible conduct. This protects professors directly, because they may regulate their conduct according to announced standards and indirectly, because administrators will be barred from arbitrary or biassed use of the standards.

The movants Professional Staff Congress of CUNY, AAUP/AFT; Connecticut State University AAUP; the Professional Staff Association/AAUP of NJIT; Western Michigan University AAUP; California Faculty Association, AAUP/NEA; and Congress of Connecticut Community Colleges AAUP all represent faculty members for purposes of collective bargaining at their respective institutions of higher education, namely, City University of New York, Connecticut State University, New Jersey Institute of Technology, Western Michigan University, universities in the California State University system, and various community colleges in Connecticut. They share the interests of the Rutgers AAUP in the preservation and promotion of academic freedom.

ARGUMENT TO BE PRESENTED BY THE MOVANTS

This case raises the question whether a professor, required to observe standards of "sound scholarship and competent teaching", received fair warning that his conduct as an employer of other university nonstudent employees could subject him to dismissal. Rutgers AAUP, which represents all faculty members at Rutgers, is uniquely situated to demonstrate the nexus between the historical construction of stated standards for dismissal and the guarantees of academic freedom. The petitioner, who

speaks from his own perspective, has not done so at any length; the respondents, who and which will defend a loose and ahistorical interpretation of the standard, will not do so.

WHEREFORE the Rutgers Council of AAUP Chapters; The Professional Staff Congress of CUNY, AAUP/AFT; the Connecticut State University AAUP; the Professional Staff Association/AAUP of NJIT; Western Michigan University AAUP; California Faculty Association, AAUP/NEA; and the Congress of Connecticut Community Colleges AAUP move for leave to file their brief *amicus curiae*, printed herewith.

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BEST AVAILABLE COPY

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

THE INTERESTS OF THE *AMICI CURIAE*

The Rutgers Council of AAUP Chapters[1] consists of three chapter affiliates of the American Association of University Professors (AAUP). The AAUP, formed in 1915, has since that time been dedicated to preserving and advancing academic freedom in our colleges and universities, and to promoting and defending the institution of academic tenure as "the means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive . . . ." *1940 Statement of Principles on Academic Freedom and Tenure*, contained in American Association of University Professors' *Policy Documents and Reports* (1990) (the "Red Book"). The AAUP achieves these goals by developing policy, like the 1940 Statement, which it then persuades institutions to adopt and abide by, and by investigating and censuring institutions that violate academic freedom. W. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex.L.Rev. 1265, 1269 (1988). The Rutgers AAUP Chapters are equally dedicated to these goals, which may be threatened by dismissal standards which may be and are capriciously applied.

The Rutgers AAUP is also the duly recognized collective negotiating agent, that has the right and duty

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1. The Rutgers Council of AAUP Chapters moved in this case to intervene in the U.S. District Court for the District of New Jersey. That motion was denied, but the Rutgers AAUP was granted status in that court as *amicus curiae*.

under state law to represent faculty members' interests in better and more secure working conditions, including enhancement of protections for academic freedom and tenure. These responsibilities complement Rutgers AAUP's role as a professional association. *Statement on Collective Bargaining, Policy Documents and Reports* at 145. The administration of discipline is a central collective negotiation concern. Rutgers AAUP is committed to the protection of tenured faculty members through strict adherence to duly established and published causes for discipline.

The Rutgers AAUP also represents the community of Rutgers scholars, who are dedicated and obligated to seek and state the truth as they see it, as scholars and as members of an academic community. The Rutgers AAUP presents to this court the true account of the history and construction of Rutgers' definition of its causes for dismissal, in fulfillment of that obligation. The Rutgers AAUP finally brings its interests in defending faculty prerogatives, as guaranteed by Rutgers' system of governance, and as fundamental to the role of faculty colleague, to participate in defining standards for faculty conduct.

The *amici*, all AAUP affiliates and collective bargaining representatives, are equally interested in the presentation of academic freedom through fair notice to tenured faculty members of what behavior on their part may subject them to the capital punishment of dismissal. The opinion of the Third Circuit threatens to create chaos and confusion in their own institutions, since if may be read as an invitation to administrators to loosen and broaden retroactively their announced dismissal standards.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD DECIDE WHETHER THE INTERPRETATION OF RUTGERS' RULES BY THE COURT OF APPEALS MAKES THEM SO VAGUE AS TO THREATEN ACADEMIC FREEDOM

At least since 1916, the AAUP has believed, in a departure from European tradition, that academic freedom necessarily encompassed the faculty member's liberty to engage in speech and conduct outside the classroom. Since then, when the AAUP began to investigate claims of violations, its "academic freedom docket has been dominated by extramural freedom cases. Of these cases, conflicts over parochial prides and precedence, and charges of hierarchic insubordination and coworker friction, have far outnumbered disputes involving the content of teaching or research." Metzger, *Definitions of Academic Freedom*, *supra*, 66 Tex.L.Rev. at 1275; W. Metzger, *Academic Freedom in the Age of the University* (1961)[2] at 206-207.

We seldom now see a full frontal assault by higher education administrators on the extramural conduct of professors. The AAUP receives, instead, complaints that academic freedom is threatened when faculty members are terminated because they are outspoken outside the classroom about institutional governance or because they

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2. Originally published as Part Two of R. Hofstader and W. Metzger, The Development of Academic Freedom in the United States (1955).

engage in conduct outside the academy which its governors deem repugnant.[3]

The Rutgers AAUP does not quarrel with the proposition that, had it wished to do so, the Rutgers Board of Governors could have adopted regulations governing extramural conduct (other than conviction of a crime involving moral turpitude), and subjecting professors to discharge for violations of the rules. Those regulations,

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3. See, e.g., Reports of Committee A (Academic Freedom) Contained in Academe (Bulletin of the American Association of University Professors), Vol. 77, No. 1 (Jan.-Feb. 1991) at 34 (nonrenewal growing out of dispute over royalty rights to patent for invention developed by faculty member); Vol. 76, No. 1 (Jan.-Feb. 1990) at 67 (nonrenewal after dispute over criticism by faculty member of departmental disharmony); Vol. 75, No. 6 (Nov.-Dec. 1989) at 34 (failure to reappoint because of alleged disagreeable communications and lack of spirit of cooperation alleged to be discrimination on the basis of sex); Vol. 75, No. 3 (May-June 1989) at 35 (refusal to recognize tenure by length of service acquired by faculty member active and outspoken in affairs of professional organization); Vol. 74, No. 3 (May-June 1988) at 29 (nonrenewal because faculty member sent letter to student newspaper criticizing colleague who sued another colleague for sexual harassment), at 41 (faculty member dismissed after administration perceived her criticisms of college governance disruptive and disparaging of the president); Vol. 76, No. 4 (July-Aug. 1990) at 50 (termination after faculty member refused to sign statement solemnly promising to cease criticisms of administrators); Vol. 73, No. 5 (Sept.-Oct. 1987) at 48 (professor fired by Catholic institution after she remarried, her first marriage having ended in civil divorce).

had they existed, would have alerted the Rutgers faculty that their voluntary conduct outside the classroom and the laboratory, even though not resulting in criminal conviction, could result in the civil penalty of dismissal from their tenured jobs.

If those regulations had existed, and if their scope had reached either conduct protected by academic freedom or conduct not reasonably related to the role of faculty members, the Rutgers AAUP or other interested parties could have challenged them as overbroad. The Rutgers AAUP would have insisted that there be a close connection between the forbidden and offensive conduct and the fitness to be a scholar and a teacher.

This insistence would have been based upon the AAUP's *Recommended Institutional Regulations on Academic Freedom and Tenure*, contained in the Red Book at 21-30. The Recommended Dismissal Procedures, at 26; state first:

> (a) Adequate cause for dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.

At Rutgers, however, faculty members rested secure based upon Rutgers' interpretations, before the decision of the United States Court of Appeals for the Third Circuit. Faculty members knew that they could only be

dismissed for violating the four grounds for discharge specified in University Regulations including (1) incompetence, (2) incapacity, (3) conviction of a crime involving moral turpitude, or (4) failure to maintain "standards of sound scholarship and competent teaching". Regulation 3.97 quoted at 9a (Petitioner's Appendix). They also believed that although their employment imposed upon them "obligations of frankness, candor and cooperation. . . with the administration," the Board of Governors had interpreted Regulation 3.97 as giving no warning that failure to adhere to the ethical code of Regulation 3.91 or failure to be truthful could lead to dismissal. Faculty members knew that the Board of Governors refused to dismiss their colleague, Prof. Villiers, even though he had a secret full-time teaching job at another institution, in violation of several express and implied responsibilities elsewhere in University policies. Faculty members knew that the Governors had found in 1979 that Prof. Villiers had no notice from Regulation 3.97 that his lack of candor about his job, or even his dual full-time employment, constituted a dismissable offense. 3dA 386-88.[4]

Faculty members also knew that another colleague, Prof. Russell Leaf, had been charged with neglect of his duties to teach, do scholarship and serve his university, in that he allegedly failed to schedule or meet classes, to hold office hours, to collect and read his mail, to conduct any research at all, to be available for collaboration or consultation with colleagues, or to attend departmental meetings and colloquia. 3dA 398-99. Yet, based on the *In re Villiers* decision of the Board of Governors, faculty members knew that the administration in 1980 had

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4. This refers to the Joint Appendix submitted to the U.S. Court of Appeals for the Third Circuit.

declined to proceed with the charges against Prof. Leaf. 3dA 404. Faculty members had reason to know that the standards set forth in Regulation 3.97 gave no notice that even gross neglect of all university duties -- even those explicitly touching on teaching or scholarship -- could subject colleagues or themselves to dismissal.[5]

Faculty members knew that Regulation 3.97 had been the topic of much debate and controversy, when the Governors contemplated revising the standards and procedures for dismissal. They believed, and they expressed their belief, that current Regulation 3.97 did not (and any new regulation should not) subject one to dismissal for such "vague" offenses as "failure to maintain professional conduct" or "conduct exhibiting neglect of university obligations or responsibilities." 3dA 291-342; 54a-56a. Faculty members knew that draft causes for dismissal or lesser discipline including "persistent or recurrent failure to maintain appropriate standards of sound scholarship and adequate teaching, gross neglect of established conditions appropriate to the appointment, gross disregard of Regulations and other written policies of the University, or conviction of a crime that involves moral turpitude and that reflects adversely upon fitness to serve as faculty members" had been proposed to the Governors in 1987, but not adopted by them. 3dA 342. Faculty members were aware that the 1975 version of

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5. The original charges against Prof. Leaf were predicated in part on Regulation 3.91, the ethical code which the Third Circuit and the District Court found in this case had not been incorporated into Regulation 3.97. However, no new charges were pressed predicated on the failure to maintain standards of sound scholarship and competent teaching.

Regulation 3.97, as construed by the Board of Governors, enunciated the sole bases for dismissal.

The Petitioner here, Prof. San Filippo, has challenged Regulation 3.97's fourth cause for dismissal, failure to maintain standards of sound scholarship and competent teaching, as void for vagueness as applied to his conduct. He claimed that it did not give him and his colleagues "fair warning" that the acts with which he was charged could result in dismissal by Rutgers. As the Court of Appeals below explained, to survive a challenge of vagueness, the rule or statute must be "sufficiently explicit" to alert people of the conduct that "will render them liable to its penalties:"

> And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

San Filippo v. Bongiovanni, 961 F.2d 1125, 1136 (3d Cir. 1992) reprinted at 27a, quoting from *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

In *Arnett v. Kennedy*, 416 U.S. 134, 160 (1974) this court found that the standards for dismissal from federal employment of "such cause as will promote the efficiency of the service" in 5 U.S.C. §7501(a) was not unconstitutionally vague. The court did not find that "reasonable men" would not differ on whether particular conduct, such as Mr. Kennedy's alleged defamation of his

colleagues, was not included in the standard. Rather, the court found that the standards were defined by history. The phrase "was not written on a clean slate in 1912," when it was enacted, and it did "not appear upon a clean slate" in 1974. Authoritative interpretations by the administrative body enforcing the statute, the Civil Service Commission, gave meaning to, and dispelled vagueness from, the standard. 416 U.S. at 160. The Commission interpreted the standard by incorporating wholesale "longstanding principles of [private sector] employer-employee relationships" into the standard. This incorporation required a reading of the catchall provisions in §7501(a) to permit dismissal for "'inveigh[ing] against [one's] superiors in public with intemperate and defamatory'" matter. (Inserts added.)

> [Dismissal in such circumstances neither] comes as an unfair surprise [nor] is so unexpected . . . as to chill . . . freedom to engage in appropriate speech. (Inserts and ellipses in original.)

416 U.S. 161-62, quoting from *Meehan v. Macy*, 392 F.2d 822, 835 (D.C. Cir. 1968), modified 425 F.2d 469, aff'd *en banc* 425 F.2d 472 (1969).

In this case, the Third Circuit turned *Arnett v. Kennedy* on its head. The court below ignored the slate upon which the Rutgers administration had clearly written a limiting history, when the administration concluded in *In re Villiers* that Regulation 3.97 did not incorporate either any general "longstanding principles of employer-employee relations" and "common sense" or any specific standards for behavior set forth elsewhere in university policies,

including the ethical guidelines of Regulation 3.91. The Court of Appeals then engrafted a "common sense" reading to make virtually universal and all-inclusive the specific and limited terms of Regulation 3.97, even though, in stark contrast with the federal government in *Arnett*, Rutgers had expressly declined to read its own regulation to proscribe all manner of conduct touching on all aspects of professional and personal responsibility, however far removed from the pure intramural exercises of teaching and scholarship.

Petitioner has explained why under *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2731 (1991), the terms "sound scholarship" and "competent teaching" fail to alert faculty members to Rutgers' limits of tolerance, since the terms of degree historically at Rutgers lack "settled usage or tradition of interpretation" to save them from vagueness. Petition at 25. Petitioner does not expand on the other two harms arising from a vague regulation: the impermissible delegation of unfettered discretion to the enforcer, and the chilling effect on those regulated. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972). Both threaten the professorate with a "pall of orthodoxy" at a time when scholars attempt diligently to explore the very bounds of academic freedom. *Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589, 603 (1967).

The faculty at Rutgers and other institutions of higher education are now engaged in spirited debate over what constitutes sound scholarship and competent teaching. The strident tones of the struggle over what should constitute the canon of a particular discipline, or whether there should even be such a canon, resonate throughout the academy and even outside it. *See, for example*, these pieces in *The Chronicle of Higher*

Education: Jay, Gregory S., *The First Round of the Culture Wars*, February 26, 1992 at B1-2; Heller, Scott, *'Common Knowledge': New Journal Aims to Build Bridges in a Fractured Academic World*, January 29, 1992 at A10; McMillen, Liz, *Olin Fund Gives Millions to Conservative Activities in Higher Education*, January 22, 1992 at A31-A32; Ellis, John M., *The Origins of PC*, January 15, 1992 at B1-2; O'Neill, Robert M., *Dealing with Intolerance for Intolerant Views*, December 18, 1991 at A44; Heller, Scott, *'Frame-Up' of Multicultural Movement Dissected by Scholars and Journalists*, November 27 ,1991 at A16-18; Haro, Robert P., *So-Called Experts on Cultural Diversity Need to Be Subjected to Careful Scrutiny*, November 13, 1991; Magner, Denise K., *Gathering to Assess Battle Against 'Political Correctness', 'Scholars' Look for New Ways to Resist 'Illiberal Radicals'*, October 30, 1991 at A17-19; Magner, Denise K., *Ideological Foes in 'PC' Debates Open a Dialogue*, October 2, 1991 at A17-18; and these pieces in *Academe*: Stimpson, Catherine R., *Meno's Boy: Hearing His Story & His Sister's*, Vol. 77, No. 6, Nov.-Dec. 1991 at 25-31; and Davidson, Cathy N., *'PH' Stands for Political Hypocrisy*, Vol. 77, No. 5, Sept.-Oct. 1991, at 8-14. These fierce battles have not resolved and are not likely soon to resolve what shall be taught. The nature of what scholars recognize as truth constantly evolves as they engage in traditional and new scholarly methods to achieve new and better understandings.

All partisans in the wars may be unable to wait until there is consensus about the curriculum and other issues before they try to undermine the strongholds of their opponents on their own campuses. A direct attack on scholarship or teaching is risky while there is violent disagreement about what is "sound" and what is unsound. How tempting and how much easier to rid an institution of the pesky opposing adherents by setting upon their

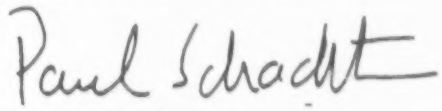
nonspeech conduct as citizens of the university community, outside the classroom, laboratory and library, and claiming that the undesirable colleagues thereby maintain unsound scholarship and incompetent teaching. The Court of Appeals invites this precise abuse, permitting administrators and colleagues to fashion novel types of unsound scholarship and incompetent teaching, based on the known sins of each targeted professor. Did he fail to pay his university parking tickets? Did she fail to return books and periodicals on time to the library? Did he overwork a nonstudent employee? Did she show disrespect for an administrator? Under the Third Circuit's reading, each of these might be deemed to "spring from his [or her] role as a faculty member at the University," and despite their irrelevance to "actual teaching or research skills", may therefore serve as the basis for dismissal. 961 F.2d at 1137; 29a.

Faculty members now fear that whatever the words of Regulation 3.97 say, and whatever the tradition of interpretation of the Regulation at Rutgers, administrators and colleagues may label all manner of conduct -- even conduct outside the academy -- as unsound scholarship and incompetent teaching. They will reason, as this court has done in the past, that this unlimited discretion will subject them to unpredictable attack: they cannot regulate their behavior precisely because neither they, nor anyone else, knows the contours of the standard. It takes little imagination to guess how "conscientious" faculty members will act, to observe their obligations and to preserve their employment "by restricting their conduct to that which is unquestionably safe" from direct or collateral attack. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The robust debate over the role and content and "competent teaching" of higher education that now flourishes is in grave danger of extinction, if "sound scholarship" and "competent teaching" may be defined *ad hoc* and may include conduct as an employee and supervisor, even though not as a teacher or scholar.

CONCLUSION

The Court should grant the writ to decide whether the vagueness doctrine was properly applied and whether the Court of Appeals correctly reversed the order granting partial summary judgment to the petitioner.

Respectfully submitted,



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